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**90-758**

No. \_\_\_\_\_

Supreme Court, U.S.

**FILED**

**OCT 22 1990**

JOSEPH F. SPANIOL, JR.  
CLERK

**IN THE SUPREME COURT OF THE UNITED  
STATES**

October Term, 1990

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**DAVID ENIX, JAMES MEHAFFIE, DAVID  
MEHAFFIE,  
DOUGLAS SAPP, KYM MEHAFFIE and  
H.F. PERKINS, *Petitioners,***

**v.**

**THE DAYTON WOMEN'S HEALTH CENTER, INC.,  
K. W. DAVIS, MD, and ROBERT SKIPTON, MD,  
*Respondents.***

**PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF OHIO**

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## QUESTIONS PRESENTED

1. Whether a permanent injunction based upon the content of the speech and not narrowly tailored to serve a compelling state interest may prohibit peaceful assembly and picketing on a public sidewalk.
2. Whether a permanent injunction may bind persons who have not engaged in any tortious activities, were not acting in concert with named defendants, have not received notice and had no opportunity to be heard.

## LIST OF PARTIES

The parties to the proceedings below were the petitioners David Enix, James Mehaffie, David Mehaffie, Douglas Sapp, Kym Mehaffie and H.F. Perkins.

The respondents before this Court include The Dayton Women's Health Center, Inc., K.W. Davis, MD, and Robert Skipton, MD.



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K.W. DAVIS, MD and  
ROBERT SKIPTON, MD, *Respondents*.

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PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF OHIO

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The petitioners David Enix, *et al*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio, entered in the above-entitled proceeding on July 25, 1990.

## **OPINIONS BELOW**

The opinion of the Supreme Court of Ohio is reported in 52 Ohio St.3d 67, 555 N.E.2d 956 (1990). The opinion of the Court of Appeals of Montgomery County, Ohio, Second Appellate District is unreported. The decision of the Common Pleas Court for Montgomery County, Ohio which ordered a permanent injunction against the Petitioners and the Defendant class is unreported. The decision of the Common Pleas Court for Montgomery County, Ohio which certified the defendant class and issued a preliminary injunction against the Petitioners and the defendant class is unreported.

## **JURISDICTION**

——The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

The opinion of the Supreme Court of Ohio was entered on June 20, 1990. Petitioners filed a timely

Application for Rehearing in the Supreme Court of Ohio on July 2, 1990. On July 25, 1990, the application was denied. This petition has been filed within ninety days of the entry of judgment overruling the Petitioners' Application for Rehearing.

### **CONSTITUTIONAL PROVISIONS INVOLVED**

This case raises issues under the Free Speech Clause of the First Amendment to the United States Constitution, which provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In addition, this case raises issues under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States

Constitution, which provides:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **STATEMENT OF THE CASE**

### **A. Procedural Posture**

This case arises from the appeal of a permanent injunction issued against Petitioners and a Defendant class which restricts speech activity in the vicinity of an abortion clinic.

On October 14, 1986, Plaintiffs-Respondents (Respondents), The Dayton Women's Health Center, Inc. (DWHC), K.W. Davis, MD, and Robert Skipton, MD, filed a Complaint, later amended, requesting



injunctive relief and damages against Defendants-Petitioners (Petitioners) and a defendant class. On January 15, 1987, the trial court certified a defendant class defined as "all individuals protesting the activities conducted at The Dayton Women's Health Center . . . who have been personally served with this entry." *Dayton Women's Health Center v. Enix*, No. 86-3120, slip op. at 4 (C.P. Montgomery Co., Ohio, Jan. 15, 1987). Petitioners were designated class representatives. The parties later submitted the case on the evidence presented and Respondents withdrew their request for damages.

A permanent injunction was issued on July 10, 1987 forbidding Petitioners and all other persons who protest the activities of DWHC (*i.e.* abortion) from, *inter alia*, verbal communications with employees, staff or volunteers of DWHC; picketing in any form at or within view of the homes of patients, employees, staff or volunteers of DWHC; picketing at or within view of the offices of physicians performing services at DWHC in groups of more than five individuals; and picketing

within view of DWHC anywhere except the public sidewalk directly in front of the clinic by more than ten persons. *Dayton Women's Health Center*, No. 86-3120, slip op. at 3-4 (C.P. Montgomery Co., Ohio, Jul. 10, 1987).

"Picketing" includes, but is not limited to "parading, parking or any other form of demonstration." According to the order of July 10, "picketing goes to the mere presence of an individual." *Id.*, at 4-5.

Petitioners filed a timely notice of appeal challenging the propriety of the injunction. On December 5, 1988, the appellate court voted 2 to 1 to uphold the injunction. The dissenting judge voted to reverse and remand the case.

The appellate court did not address the merits of Petitioners' primary assignment of error challenging the propriety of certifying the defendant class and of issuing an injunction against the class. The appellate court determined that appeal of the class certification issues had been forfeited by Petitioners' failure to immediately appeal the January 15, 1987 order certifying the class

and issuing a preliminary injunction against it.<sup>1</sup> The appellate court did not address arguments made by Petitioners in which they asserted that an injunction could not be issued against a defendant class of "individuals protesting."

On January 9, 1989, Petitioners filed a notice of appeal and a motion for the appellate court to certify the case to the Supreme Court of Ohio because of conflicts between the decision and the decisions of other Ohio appellate courts.<sup>2</sup> An order granting the motion

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1 Under Ohio law certain interlocutory orders can be appealed prior to final judgment pursuant to the "final order in special proceedings" doctrine. Ohio Rev. Code Sec. 2505.02. This doctrine, which is analogous to the federal "collateral order" doctrine, permits the immediate appeal of certain orders based on a balancing test when the need for immediate review (because meaningful review may not be practicable after final judgment) outweighs piecemeal appeals. Prior to the instant case the Supreme Court of Ohio had not ruled on the appealability of the certification of a *defendant* class. The only court which had addressed the issue was the Court of Appeals of Hamilton County, in *Planned Parenthood Association of Cincinnati v. Project Jericho*, Case No. C- 860430 (1st Dist. Ct. App. 1986). *Planned Parenthood* held that an order certifying a defendant class was not immediately appealable under Ohio's special proceedings doctrine. Petitioners' relied on *Planned Parenthood* in not filing an immediate appeal of the class certification.

for certification was issued on January 27, 1989, and filed in the Supreme Court of Ohio on February 6, 1989.

On June 20, 1990 the Supreme Court of Ohio affirmed the appellate court's decision regarding the appealability of an order certifying a defendant class. The Supreme Court of Ohio declined to address the merits of the constitutional issues that were presented to it.

On July 2, 1990, Petitioners filed an Application for Rehearing and requested, among other things, that the court rule on all the constitutional issues presented. This application was denied on July 25, 1990.

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2 Under Ohio law, an appellate court is required to certify a case for review to the Supreme Court of Ohio when it finds that its decision conflicts with the decision of another Ohio appellate court. Ohio Const. art. IV, 3(B)(4). When a case is certified to the Supreme Court of Ohio, all of the issues are brought before that Court, not just the issue in conflict. *E.g., State v. Volpe*, 38 Ohio St. 3d 191, 192, 527 N.E.2d 818, 819 (1988); *State v. Young*, 37 Ohio St. 3d 249, 525 N.E.2d 1363 (1988). The Court of Appeals for Montgomery County found its holding that an interlocutory order certifying a defendant class was immediately appealable was in conflict with the decision in *Planned Parenthood Association of Cincinnati v. Project Jericho* (see footnote one *supra*) and therefore certified the case to the Supreme Court of Ohio.

## B. Statement of Facts

DWHC is an abortion clinic located in a commercial area in Dayton, Ohio. The other two Respondents work at DWHC and have a private office elsewhere. DWHC is housed in a three-story building that is approximately 70 feet from the public street (South Dixie Drive) and the sidewalk it faces. The building is owned by DWHC's director. DWHC occupies the top two floors.

In May and June of 1986, Petitioners began picketing at DWHC on Tuesdays and Fridays for one to two hours each day. The number ranged from 8 to 20 picketers, with an average of 12. Picketers changed from day to day and no group or person sponsored or organized the picketing. There was never a crowding problem on the sidewalk in front of DWHC.

Although Respondents' complaint alleged violent conduct, the trial court included no violent acts in its

findings. *Dayton Women's Health Center*, at 4-5. Five of the six Petitioners were accused of trespassing on a parking lot in front of DWHC. The alleged instances of trespassing were rare, harmless and often disputed. Although Respondents alleged that access to DWHC had been obstructed by picketers on occasion, no one was ever prevented from entering or leaving DWHC. To avoid any possible blocking problem, picketers discontinued patrolling on the sidewalk in front of the driveway leading into DWHC three months before the suit was filed.

There was no evidence that class members engaged in any tortious conduct. Other evidence at trial concerned unidentified and unknown persons, which was admitted over Petitioners' objections because this was a "class action."

## REASONS FOR GRANTING THE WRIT

This case involves an unprecedented viewpoint-based injunction which is unconstitutional in that it enjoins persons based simply on whether their speech protests abortion. The injunction is not supported by any compelling state interest. Those enjoined are not accused of any wrongdoing. The only notice allowed them was to be served on location by members of the Respondent's staff. An adjudication of the First Amendment rights of present and future class members occurred before they had notice, and before they had an opportunity to be heard.

### I.

**The permanent injunction directly contravenes the First Amendment guarantees of free speech and free assembly in that it is a content-based restriction on political speech in a public forum and is not narrowly tailored to serve a compelling state interest.**

The Supreme Court of Ohio has created law which is opposed to the U.S. Constitution and the



settled precedents of this Court. By allowing the injunction to stand, Ohio's court of last resort has undermined the mandates of the highest court in the nation. Such an affront to the Constitution deserves this Court's attention.

The injunction in the instant case is directly analogous to the invalid statute in *Boos v. Barry*, 485 U.S. 312, 99 L.Ed.2d 333, 108 S.Ct. 1152 (1988). The statute at issue in *Boos* prohibited, within 500 feet of any foreign embassy, picketing in protest of the government represented by the embassy. The Court struck down the anti-picketing statute as a content-based restriction unsupported by any compelling state interest. The injunction here, like the invalid statute in *Boos*, prohibits core First Amendment expression - classic political speech. Time and again this Court has declared that such prohibitions are constitutionally unsound:

We have recognized that the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide open," *New York Times*



*v. Sullivan*, 376 U.S. 254, 270, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964)...This has led us to scrutinize carefully any restrictions on public issue picketing.

*Id.* at 318,

The injunction forbids speech protesting abortion on the public sidewalk, the streets, and on the private property of others within view of the DWHC, despite the fact the protesters have the permission of the private property owners.

Public streets and sidewalks, as noted in *Boos*, are especially protected public fora, which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 83 L.Ed. 1423, 59 S.Ct. 954 (1939).

The statute in *Boos* forbade picketing expressing a certain viewpoint. As the Court noted,

Whether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not. One category of speech has been completely

prohibited within 500 feet of embassies. Other categories of speech, however, are permitted.

Id., at 318-319

Though the Respondents in *Boos* contended that the statute was content-neutral, this Court found otherwise. There can be no viewpoint-based restrictions of free speech in the public forum which are not narrowly tailored to serve a compelling state interest. In the instant case the permanent injunction forbids:

1. Picketing anywhere within view of the DWHC except the public sidewalk in front of the clinic.
2. The injunction does not allow more than 10 persons to protest by "mere presence" on that public sidewalk.
3. Only speech protesting abortion is prohibited.
4. Petitioners may not protest on private property with the owner's permission, if that property is within view of DWHC.
5. Individuals or groups may gather anywhere within view of DWHC to protest about any other issue, or to picket in favor of abortion. Such persons would be free to speak with employees or patients of the clinic. Only protest against abortion is prohibited.

This injunction far exceeds the restrictions struck down in *Boos*. The Ohio courts have gone beyond violating mere content-neutrality; they have extended their reach to exclude a disfavored viewpoint about abortion. See also *United States v. Grace*, 461 U.S. 171, 75 L.Ed.2d 736, 103 S.Ct. 1702 (1983); *Carey v. Brown*, 447 U.S. 455, 65 L.Ed.2d 263, 100 S.Ct. 2286 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972).

Ruling on the statute in *Boos* this Court cited *Perry Educators Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45, 74 L.Ed.2d 794, 103 S.Ct. 948 (1983), for the contention that content-based restrictions on speech in the public forum are valid only if they are necessary to serve a compelling state interest; further, they must be narrowly drawn to serve that interest. *Boos*, at 321. See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 73 L.Ed.2d. 1215, 102 S.Ct. 3409 (1982); *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 93 L.Ed.2d 539, 107 S.Ct. 616 (1986); *Clark v. Community for Creative Non-*

*Violence*, 468 U.S. 238, 82 L.Ed.2d 221, 104 S.Ct. 3065 (1984); *Califano v. Yamasaki*, 442 U.S. 682, 61 L.Ed.2d 176, 99 S.Ct. 2545 (1979).

The injunction provides that Petitioners and class members may not: (1) be present within view of the offices of physicians performing services at DWHC in groups of more than five, (2) be present at any other location within view of DWHC other than the sidewalk bordering the east side of the sidewalk in front of DWHC, or (3) be present within view of DWHC in groups of more than ten. *Dayton Women's Health Center, supra*, at 3-4. Petitioners cannot drive past DWHC at any time for any reason because, as the order states, "picketing goes to mere presence." Further restrictions prohibit Petitioners from being merely present at any residence or commercial establishment within view of DWHC for any purpose, including constitutionally protected activity or legitimate business purposes. Such overbroad restrictions are anything but narrowly tailored.

The only rights involved in this case are those of private parties - the DWHC, their staff or their patients. The Supreme Court of Ohio, without any compelling state interest being at stake, failed to reverse an overbroad and vague injunction restricting the free speech of all persons who protest abortion in the public forum.

In *NAACP v. Claiborne Hardware Co.*, *supra*, this Court held that "the right to associate does not lose all constitutional protection merely because some members of the group have participated in conduct or advocated doctrine that is itself not protected." *Id.*, at 908. The Court added that:

Petitioners admittedly sought to persuade others to join the boycott through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.

*Id.*, at 909-910

The overbroad injunction upheld by the Supreme Court of Ohio flies in the face of the Supreme Court's mandate in *Claiborne Hardware*. An order so at odds with clearly delineated constitutional guidelines requires correction by this Court.

## II.

**The injunction violates the Due Process rights of absent class members by adjudicating their rights to free speech without notice or opportunity to be heard.**

This content-based injunction, unsupported by any compelling or substantial state interest, prevents persons who have never been accused or found guilty of any wrongdoing from exercising their rights to free speech. Class members enjoined were neither notified of the action against them nor afforded an opportunity to defend their individual rights in court before the order was entered. The Ohio courts have, in fact, delegated the authority to serve notice on potential

defendent-class members to the employees of a party in interest to the case -- DWHC. The potential for abuse entailed by leaving this discretion in the hands of one side of the adversarial process is frightening.

The injunction violates Petitioners' due process rights when it presumes "to make punishable the conduct of persons who act independently [from the parties'] and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13, 89 L.Ed. 661, 85 S.Ct. 478 (1945). Judge Learned Hand explained in *Alemite Manufacturing v. Staff*, 42 F.2d 832, 832-22 (2d Cir. 1930), why an injunction cannot bind non-parties who act independently: A court "is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it has personal service, and who therefore have their day in court." *Alemite* was followed by this Court in *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436-37, 78 L.Ed. 894, 54 S.Ct. 475 (1934), which held it to be error to extend an



injunction to "all persons to whom notice of the injunction should come." This Court observed:

[B]y extending the injunction to "all persons to whom notice of the injunction should come," the District Court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law . . . . To subject them to such peril violates established principles of equity jurisdiction and procedure.

*Id.*

The injunction violates that standard because it purports to bind anyone served with it who protests DWHC's activity even though they (1) are non-parties, (2) received no notice of the lawsuit, (3) did not have their day in court in a proceeding adjudicating their personal rights, and (4) act independently of the parties. The injunction, therefore, deprives such people of their liberty without affording due process of law.

The due process violations are even more egregious because the injunction restricts and threatens with contempt innocent non-parties whose only defining



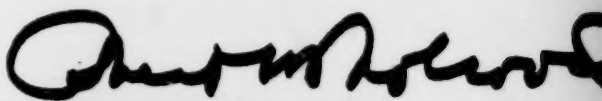
characteristic is that they have engaged in free speech activity, as defined by the court, within view of DWHC. In *Claiborne Hardware, supra*, this Court specifically recognized that such innocent persons cannot be so enjoined. In sharp disregard of this clear precedent, the Ohio courts have assumed that parties who have committed no tortious acts and have no connection with the named Petitioners may still be held in contempt under the injunction. That the persons so enjoined engaged in nothing more than constitutionally protected activities appears to be no defense. The Ohio state courts have assumed that anyone's free speech may be enjoined if they are merely present and are perceived by DWHC staff members as sharing the viewpoints of the Petitioners regarding abortion.

## CONCLUSION

Clearly this nation is deeply divided over the issue of abortion. The public sidewalk, as the quintessential public forum, plays an integral role in this continuing debate. As it stands, this injunction allows state courts to hold hostage federal constitutional rights, inhibiting the open and robust exchange of ideas. This cannot continue, though continue it will as the state courts ignore free speech rights in disregard of clear Supreme Court precedents. This case is unprecedented because the primary purpose of the injunction in question is to specifically prohibit the expression of one viewpoint. If the First Amendment is to have any force at all, it must protect free speech rights from being circumvented solely because the one seeking to exercise them does so within view of those who disagree with the ideas expressed. That however is precisely what this injunction seeks to do. It excludes from the public forum one voice and one voice only: that of the person protesting abortion. For these and the various reasons

previously cited, Petitioners pray that the writ of certiorari be granted.

Respectfully submitted,



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APPENDIX

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Filed Jan. 15, 1987, at 1:56 p.m.

IN THE COMMON PLEAS COURT OF  
MONTGOMERY COUNTY, OHIO

THE DAYTON WOMEN'S	:	
HEALTH CENTER,	:	CASE NO. 86-3120
et al.,	:	
Plaintiffs,	:	(Judge John M. Meagher)
	:	
v.	:	DECISION, ENTRY &
	:	ORDER OVERRULING
	:	DEFENDANTS' MOTION
	:	TO STRIKE PLAINTIFFS'
	:	CLASS ACTION;
DAVID ENIX et al.,	:	CERTIFYING CASE AS
	:	CLASS ACTION; AND
Defendants.	:	SUSTAINING
	:	PLAINTIFFS' MOTION
	:	FOR PRELIMINARY
	:	INJUNCTION.

: : : : : : : : : : : : : :

This matter comes before the court on  
defendants' motion to strike plaintiffs' class action and  
plaintiffs' motion for preliminary injunction.

The facts indicate that the plaintiffs brought this  
action in October 1986 claiming that defendants have  
interfered with plaintiffs' business, staff and patients by  
engaging in a variety of activities including invasion of  
privacy, trespass and interference with business

relationships. Plaintiffs pray for injunctive relief and monetary damages.

Defendants move to strike plaintiffs' class action claiming that the requirements of Ohio Civil Rule 23 have not been satisfied. An examination of Rule 23(A) lists the four prerequisites necessary for a class action lawsuit.

One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable.

[No. 86-3120, 2]

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

In addition, one of the requirements enumerated in Rule 23(B) must be met:

An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(a) inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct to the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole...

The Court finds from the evidence that the first

[No. 86-3120, 3]

requirement of Rule 23(A) is clearly satisfied inasmuch as on at least two separate occasions, up to seventy-five (75) persons have engaged in picketing activities at the Dayton Women's Health Center. Thus, the class is so numerous that joinder of all members is impractical. Lastly, the Court finds no merit in the contention that



the granting of an injunction against defendant class would be an injunction against the entire world.

The second requirement, that is, that questions of law or fact be common to the class is also clearly satisfied, in light of the many instances involving representatives of the class in acts of trespass, obstruction and interference with the orderly flow of traffic on South Dixie Drive and verbal abuse.

The third and fourth prerequisites of Rule 23(A) are also met. The Court finds no conflict of interest between the representatives of the class and the defendant class itself. Furthermore, the Court finds that the representatives of the class have already, and will continue to, adequately represent the interests of the class.

Finally, it is apparent to the court that the requirement of Rule 23(B)(1) has been satisfied and thus warrants certification of plaintiffs' proposed class. If this matter was allowed to proceed without class certification, separate adjudication could possibly result in prejudice to non-party litigants. In short, all the

requirements necessary to maintain a class action have been satisfied.

[No. 86-3120, 4]

Therefore, in the interest of judicial efficiency and in accordance with the forgoing, defendants' motion to strike plaintiffs' class action is OVERRULED.

Therefore, the Court, pursuant to Rule 23, certifies this matter as a defendant class action whose class consists of:

all individuals protesting the activities conducted at the Dayton Women's Health Center, 3460 South Dixie Drive, Dayton, Ohio 45439, who have been personally served with this Entry and Preliminary Injunction as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of the Entry and Preliminary Injunction.

Plaintiffs' motion for preliminary injunction and defendants' opposition to it asks this Court to balance the defendants' constitutional right to free speech and assembly versus plaintiffs' constitutional right to privacy.

Plaintiffs operate the Dayton Women's Health Center which provides various health services including,

but not limited to, therapeutic abortions. Defendant class objects to these services and has conducted various activities at the Center and the offices of the Center's physicians.

The Court, after carefully listening to all the testimony during three days of hearings, has determined that the defendants' conduct includes:

1) interference with the daily business operations of the Health Center including trespass upon the Health Center's

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property,

2) obstruction of the driveway which enters the Health Center's lot, and

3) interference with the flow of traffic on South Dixie Drive.

Therefore, the Court concludes that a preliminary injunction is the appropriate remedy in this matter.

The Supreme Court of the United States has determined that although freedom of speech is highly protected, it is not absolute. In fact, reasonable time,

place and manner restrictions may be enforced providing that such restrictions are narrowly tailored to serve a significant governmental interest, leave open ample alternative channels of communication and are content neutral *United States v. Grace*, 461 U.S. 171 (1983). Therefore, in light of the evidence and balancing the constitutionally protected interests of both parties, the Court ORDERS that the defendant class and the representative defendants, David Enix, Jim Mehaffie, David Mehaffie, Kim Mehaffie, Douglas Sapp and H.F. Perkins are enjoined from:

- 1) Blocking or interfering with the access or egress of any individual going to or from the Dayton Women's Health Center.

- 2) Blocking or interfering with the driveway of the Dayton Women's Health Center.

- 3) Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching

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the staff or patients inside the Dayton Women's Health Center.

4) Trespassing on the property of the Dayton Women's Health Center.

5) Verbal communications, either in person or by telephone, with employees of the Center unless such communications are with the consent of such employees.

6) Picketing at or within viewing distance of the homes of such employees in groups of more than three (3) individuals.

7) Picketing at or within viewing distance of the offices of such employees in groups of more than five (5) individuals.

8) Picketing at or within viewing distance of the Dayton Women's Health Center in groups of more than ten (10) individuals.

The court carefully reviewed the videotapes marked as plaintiffs' exhibits 14 and 15 and reaches the conclusion that serious issues of public safety exist that involve the members of defendant class and drivers and

passengers of vehicles on South Dixie Drive. Two examples which illustrate the problem include the use of large red sign with the letters S-T-O-P and the use of signs urging motorists to honk. Both types of signs could easily confuse a driver or contribute to driver distraction and subsequently result in a collision with other vehicles or the picketers themselves. Accordingly, the Court feels compelled to further enjoin the defendant class and their representatives from

[No. 86-3120, 7]

9) Blocking or interfering with the flow of traffic on, from or to South Dixie Drive.

10) Picketing on the west side of South Dixie Drive.

11) Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs.

12) Using any sign urging motorists to honk.

In accordance with the foregoing, plaintiffs' motion for preliminary injunction is SUSTAINED.

Plaintiffs shall post a copy of this Order in front of the clinic at 3460 South Dixie Drive, Dayton, Ohio 45439. This notice is only an accommodation. Official class notice is by personal service on class members.

No further service of this Order shall be necessary on the representative defendants. For the purpose of this Order, "persons picketing" and a "picket" include persons present in the area referred to in this Order who are carrying protest and informational signs, passing out literature, speaking publicly, or otherwise engaged in activity intended to inform, influence and persuade the public about matters of public interest, including abortion. Service of this Order on such people shall be effected by the Sheriff of Montgomery County. Service documented by videotape will be preferred. Other evidence of service will be acceptable at the option of the Court. Those serving members of the class with this Order shall request the name and address of

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of (*sic*) the person served. A person refusing to accept the Order shall be deemed to be served.

The Sheriff of Montgomery County may enforce the terms of this Order.

SO ORDERED:

/s/ John M. Meagher

John M. Meagher, Judge

Copies of this Decision, Entry & Order were served on all parties, as is indicated below, by ordinary mail this filing date:

DAVID GREER/JOHN HAVILAND, Attorneys for Plaintiffs

DAVID HAFHEY, Attorney for Defendants, D. Enix, D. & K. Mehaffie, D. Sapp and H.F. Perkins

JAMES CONDIT, Attorney for Defendant, Jim Mehaffie

CATHY MILLER, Bailiff

MONTGOMERY COUNTY SHERIFF'S  
DEPARTMENT





IN THE COMMON PLEAS COURT OF  
MONTGOMERY COUNTY, OHIO

THE DAYTON	:	
WOMEN'S HEALTH	:	
CENTER, et al.,	:	CASE NO. 86-3120
	:	
Plaintiffs,	:	(Judge John M. Meagher)
	:	
v.	:	DECISION, ENTRY & ORDER
	:	OVERRULING DEFENDANTS'
	:	MOTIONS TO AMEND
	:	PENDANT INJUNCTION;
DAVID ENIX et al.,	:	OVERRULING PLAINTIFFS'
	:	MOTION TO MODIFY THE
Defendants	:	PRELIMINARY INJUNCTION;
	:	ORDERING DEFENDANTS
	:	AND DEFENDANT CLASS
	:	PERMANENTLY ENJOINED;
	:	AND ORDERING MEMBERS
	:	MAY BE ADDED TO
	:	DEFENDANT CLASS.
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This matter comes before the Court on  
defendants Jim Mehaffie and David Mehaffie's motions  
to amend pendant injunction, plaintiffs' motion to  
modify preliminary injunction, and the parties' request  
for a permanent injunction on the evidence submitted.

Defendants moves this Court to amend the  
injunction by incorporating the following:

1. Eliminating the O.R.C.P. 23 "class certification.

2. Eliminate the language "within viewing distance of" as a limitation on the picketing activities at any site.

3. Increase the number of picketers authorized to 20 on each side of South Dixie Drive in front of the Plaintiff Center and increase the number of picketers to 20 at other sites covered by the order.

4. Eliminate all other aspects as to personal conduct except the terms "blocking" or "interfering" in the ingress and egress of any individual going to or from the Plaintiff Center including the driveways of the Center; and, trespassing.

[No. 86-3120, 2]

5. Redefine "picketing" to include only persons who are present in the area and carrying protest and informational signs.

Defendants contend that the current injunction exceeds the Court's jurisdiction and powers and therefore believe that these changes are warranted.

Plaintiffs oppose defendants' motions to amend the injunction. Plaintiffs correctly point out that defendants' memorandum of law in support of defendants' motions contains no discussion but simply lists six cases from foreign jurisdictions of which the first five discuss generally the requirements for certifying a

plaintiff's class action. Notwithstanding the cases cited which discuss certifying class actions, the defendants have cited no legal authority relevant to the issues raised in their motions. Moreover, the defendants have not presented any new evidence or reasons to support the suggested amendments.

In light of the foregoing, defendants' motions to amend pendant injunction are OVERRULED.

Plaintiffs move for an order modifying the preliminary injunction by adding the following:

"it is further Ordered that the Sheriff of Montgomery County, Ohio, or any other law enforcement officer be and he hereby is authorized to arrest for contempt any defendant or member of the defendant class observed violating the terms of the injunctions issued by this Court."

Plaintiffs make this request as an alternative to the cumbersome

[No. 86-3120, 3]

procedure of motions to show cause.

After careful consideration, the Court is satisfied that the current procedure involving motions to show cause, although cumbersome, is the appropriate manner to bring a potential contemner to the Court's attention.

Accordingly, plaintiffs' motion to modify the preliminary injunction is OVERRULED.

Counsel for the parties having submitted this matter to the Court on the evidence presented at the various hearings thus far held, it is ORDERED that the individual defendants and the defendant class previously certified by the Court and consisting of all individuals protesting the activities conducted at The Dayton Women's Health Center, 3460 South Dixie Drive, Dayton, Ohio, who have been personally served with this Entry and Order of Final Judgment or with this Court's Entry and Preliminary Injunction of January 15, 1987, as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of the Entry and Order of Final Judgment or this Court's Entry and Preliminary Injunction of January

25, 1987, be and they hereby are permanently enjoined from:

1. Blocking or interfering with the access or egress of any individual going to or from The Dayton Women's Health Center;

2. Blocking or interfering with the driveway of The Dayton Women's Health Center;

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3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;

4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs, or using any sign urging motorists to honk;

5. Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside The Dayton Women's Health Center;

6. Trespassing on the property of The Dayton Women's Health Center;

7. Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers;

8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients, employees, staff or volunteers of The Dayton Women's Health Center or of physicians performing services at The Dayton Women's Health Center;

9. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at The Dayton Women's Health Center in groups of more than five individuals;

10. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within the viewing distance of The Dayton Women's Health Center;

11. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility;

12. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center in groups of more than ten (10) individuals.

For purposes of this injunction, the term "picketing" includes, but is not limited to, parading, parking or any other form of demonstration. In fact, "picketing" goes to the mere

[No. 86-3120, 5]

presence of an individual.

1 It is further ORDERED that members may be added to the defendant class by effecting service of a copy of this Order on individuals falling within the description of the defendant class by the Sheriff of

Montgomery County, any other law enforcement individual or by any employee of The Dayton Women's Health Center.

The individual effecting such service shall thereafter file in this action a signed Certificate of Service stating the date, time and place of service together with the name and address of the individual upon whom such service was made.

All individuals who are members of the defendant class shall divulge to the individual effecting such service the name and address of any individual upon whom such service is effected, to the extent such information is known. If the name and address of the individual upon whom such service is effected is not known at the time of service, a photograph of the individual may be attached to the Certificate of Service in lieu of such information. Any employee of The Dayton Women's Health Center is hereby authorized to photograph the effecting of any such service.

Counsel should take note that this Decision, Entry and Order is also in the form of a judgment



entry. Therefore, the time for prosecuting an appeal to the Second District Court of Appeals must be computed from the date upon which this decision and entry is filed.

[No. 86-3120, 6]

Costs are to be paid by the defendants.

SO ORDERED:

/s/ John M. Meagher

John M. Meagher, Judge

Copies of this Decision, Entry & Order served on all parties, indicated below, by ordinary mail this filing date:

DAVID C. GREER, Attorney for Plaintiffs

DAVID A. HAFHEY, Attorney for Defendants, D. Enix, D. & K. Mehaffie, D. Sapp, and H.F. Perkins

JAMES J. CONDIT, Attorney for Defendant, James Mehaffie and for Defendant Class

MONTGOMERY COUNTY SHERIFF  
DEPARTMENT

CATHY MILLER, Bailiff

IN THE COMMON PLEAS COURT OF  
MONTGOMERY COUNTY, OHIO

THE DAYTON	:	
WOMEN'S HEALTH	:	
CENTER, et al.,	:	CASE NO. 86-3120
	:	
Plaintiffs,	:	(Judge John M. Meagher)
	:	
v.	:	DECISION, ENTRY & ORDER
	:	OVERRULING DEFENDANTS'
	:	MOTIONS TO AMEND
	:	PENDANT INJUNCTION;
DAVID ENIX et al.,	:	OVERRULING PLAINTIFFS'
	:	MOTION TO MODIFY THE
Defendants	:	PRELIMINARY INJUNCTION;
	:	ORDERING DEFENDANTS
	:	AND DEFENDANT CLASS
	:	PERMANENTLY ENJOINED;
	:	AND ORDERING MEMBERS
	:	MAY BE ADDED TO
	:	DEFENDANT CLASS.
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This matter comes before the Court on  
defendants Jim Mehaffie and David Mehaffie's motions  
to amend pendant injunction, plaintiffs' motion to  
modify preliminary injunction, and the parties' request  
for a permanent injunction on the evidence submitted.

Defendants moves this Court to amend the  
injunction by incorporating the following:

1. Eliminating the O.R.C.P. 23 "class certification.

2. Eliminate the language "within viewing distance of" as a limitation on the picketing activities at any site.

3. Increase the number of picketers authorized to 20 on each side of South Dixie Drive in front of the Plaintiff Center and increase the number of picketers to 20 at other sites covered by the order.

4. Eliminate all other aspects as to personal conduct except the terms "blocking" or "interfering" in the ingress and egress of any individual going to or from the Plaintiff Center including the driveways of the Center; and, trespassing.

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5. Redefine "picketing" to include only persons who are present in the area and carrying protest and informational signs.

Defendants contend that the current injunction exceeds the Court's jurisdiction and powers and therefore believe that these changes are warranted.

Plaintiffs oppose defendants' motions to amend the injunction. Plaintiffs correctly point out that defendants' memorandum of law in support of defendants' motions contains no discussion but simply lists six cases from foreign jurisdictions of which the first five discuss generally the requirements for certifying a

plaintiff's class action. Notwithstanding the cases cited which discuss certifying class actions, the defendants have cited no legal authority relevant to the issues raised in their motions. Moreover, the defendants have not presented any new evidence or reasons to support the suggested amendments.

In light of the foregoing, defendants' motions to amend pendant injunction are OVERRULED.

Plaintiffs move for an order modifying the preliminary injunction by adding the following:

"it is further Ordered that the Sheriff of Montgomery County, Ohio, or any other law enforcement officer be and he hereby is authorized to arrest for contempt any defendant or member of the defendant class observed violating the terms of the injunctions issued by this Court."

Plaintiffs make this request as an alternative to the cumbersome

[No. 86-3120, 3]

procedure of motions to show cause.

After careful consideration, the Court is satisfied that the current procedure involving motions to show cause, although cumbersome, is the appropriate manner to bring a potential contemner to the Court's attention.

Accordingly, plaintiffs' motion to modify the preliminary injunction is OVERRULED.

Counsel for the parties having submitted this matter to the Court on the evidence presented at the various hearings thus far held, it is ORDERED that the individual defendants and the defendant class previously certified by the Court and consisting of all individuals protesting the activities conducted at The Dayton Women's Health Center, 3460 South Dixie Drive, Dayton, Ohio, who have been personally served with this Entry and Order of Final Judgment or with this Court's Entry and Preliminary Injunction of January 15, 1987, as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of the Entry and Order of Final Judgment or this Court's Entry and Preliminary Injunction of January

25, 1987, be and they hereby are permanently enjoined from:

1. Blocking or interfering with the access or egress of any individual going to or from The Dayton Women's Health Center;

2. Blocking or interfering with the driveway of The Dayton Women's Health Center;

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3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;

4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs, or using any sign urging motorists to honk;

5. Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside The Dayton Women's Health Center;

6. Trespassing on the property of The Dayton Women's Health Center;

7. Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers;

8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients, employees, staff or volunteers of The Dayton Women's Health Center or of physicians performing services at The Dayton Women's Health Center;

9. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at The Dayton Women's Health Center in groups of more than five individuals;

10. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within the viewing distance of The Dayton Women's Health Center;

11. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility;

12. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center in groups of more than ten (10) individuals.

For purposes of this injunction, the term "picketing" includes, but is not limited to, parading, parking or any other form of demonstration. In fact, "picketing" goes to the mere

[No. 86-3120, 5]

presence of an individual.

It is further ORDERED that members may be added to the defendant class by effecting service of a copy of this Order on individuals falling within the description of the defendant class by the Sheriff of



Montgomery County, any other law enforcement individual or by any employee of The Dayton Women's Health Center.

The individual effecting such service shall thereafter file in this action a signed Certificate of Service stating the date, time and place of service together with the name and address of the individual upon whom such service was made.

All individuals who are members of the defendant class shall divulge to the individual effecting such service the name and address of any individual upon whom such service is effected, to the extent such information is known. If the name and address of the individual upon whom such service is effected is not known at the time of service, a photograph of the individual may be attached to the Certificate of Service in lieu of such information. Any employee of The Dayton Women's Health Center is hereby authorized to photograph the effecting of any such service.

Counsel should take note that this Decision, Entry and Order is also in the form of a judgment



entry. Therefore, the time for prosecuting an appeal to the Second District Court of Appeals must be computed from the date upon which this decision and entry is filed.

[No. 86-3120, 6]

Costs are to be paid by the defendants.

SO ORDERED:

/s/ John M. Meagher

John M. Meagher, Judge

Copies of this Decision, Entry & Order served on all parties, indicated below, by ordinary mail this filing date:

DAVID C. GREER, Attorney for Plaintiffs

DAVID A. HAFHEY, Attorney for Defendants, D. Enix, D. & K. Mehaffie, D. Sapp, and H.F. Perkins

JAMES J. CONDIT, Attorney for Defendant, James Mehaffie and for Defendant Class

MONTGOMERY COUNTY SHERIFF  
DEPARTMENT

CATHY MILLER, Bailiff

IN THE COURT OF APPEALS OF MONTGOMERY  
COUNTY, OHIO

THE DAYTON WOMEN'S :  
HEALTH :  
CENTER, ET AL :

Plaintiffs-Appellees :

vs. :

CASE NO. 10579

DAVID ENIX, ET AL :

Defendants-Appellants :

.....

OPINION

Rendered on the 5th day of December, 1988

.....

DAVID C. GREER, 400 Gem Plaza, Third and Main  
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[No. 10579, 2]

Attorney for Amicus Curiae

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Box 64845, Virginia Beach, VA 23464  
Attorney for Amicus Curiae

.....

WILSON, J.

The plaintiff-appellee, Dayton Women's Health  
Center, Inc., provides reproductive health services for  
women including abortions. The other two plaintiffs are  
K.W. Davis, M.D. and Robert Skipton, M.D. The  
doctors are employed by the center and each has a  
private practice in Kettering.

In the fall of 1986, the plaintiffs filed a complaint alleging that the defendants, David Enix, Jim Mehaffie, David Mehaffie, Kim Mehaffie, Douglas Sapp, H.F. Perkins, and other unidentified persons, had engaged in tortious activity which interfered with the delivery of medical service at the center and the private offices of the plaintiff doctors.

The prayer of the complaint was for damages and injunctive relief. The complaint also sought to have the case certified as a defendant class action.

After hearings an entry was filed on January 15, 1987 granting a preliminary injunction and certifying the case as a defendant class action whose class consists of:

"all individuals protesting the activities conducted at the Dayton Women's Health Center, 3460 South Dixie Drive, Dayton, Ohio 45439, who have been personally served with this Entry and Preliminary Injunction as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of

[No. 10579, 3]

the Entry and Preliminary Injunction."

The trial court found that the defendants' conduct includes:

- 1) interference with the daily business operations of the Health Center including trespass upon the Health Center's property,
- 2) obstruction of the driveway which enters the Health Center's lot, and
- 3) interference with the flow of traffic on South Dixie Drive.

The trial court then issued a preliminary injunction enjoining the defendant class and the named defendants from:

- 1) Blocking or interfering with the access or egress of any individual going to or from the Dayton Women's Health Center.
- 2) Blocking or interfering with the driveway of the Dayton Women's Health Center.
- 3) Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients inside the Dayton Women's Health Center.
- 4) Trespassing on the property of the Dayton Women's Health Center.
- 5) Verbal communications, either in person or by telephone, with employees of the Center unless

such communications are with the consent of such employees.

6) Picketing at or within viewing distance of the homes of such employees in groups of more than three (3) individuals.

7) Picketing at or within viewing distance of the offices of such employees in groups of more than five (5) individuals.

8) Picketing at or within viewing distance of the Dayton Women's Health Center in groups of more than ten (10) individuals.

9) Blocking or interfering with the flow of traffic on, from or to South Dixie Drive.

[No. 10579, 4]

10) Picketing on the west side of South Dixie Drive.

11) Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs.

12) Using any sign urging motorists to honk.

The order of January 15, 1987 also defined picketing:

For the purpose of this Order, 'persons picketing' and a 'picket' include persons present in the area referred to in this Order who are carrying protest and informational signs, passing out literature, speaking publicly, or otherwise engaged in activity intended to inform, influence and persuade the public about matters of public interest, including abortion.

The preliminary injunction order of January 15, 1987 was thereafter amended in several respects including an order dated February 27, 1987 which provides:

It is the intention of this Court by this amendment to prohibit any residential picketing/demonstrations until such time the Court may fully review all the evidence presented in the hearing February 27, 1987.

The order of January 15, 1987 was again amended by an entry filed March 16, 1987. This order enjoined the defendants and the defendant class from:

- 1) Picketing in any form including parking, parading, or demonstrating on the west side of South Dixie Drive within the viewing distance of The Dayton Women's Health Center, and
- 2) Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of South Dixie Drive in front of the facility in groups of more than ten (10) individuals.

The order further made clear that picketing goes to the mere presence of an individual.

[No. 10579, 5]



The Court also enjoined all of the defendants from:

Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients of The Dayton Women's Health Center, employees of The Dayton Women's Health Center and physicians performing services at The Dayton Women's Health Center.

In the same order, the court refused to enjoin the defendants from using signs or communications that make any personal reference to patients or employees of the center.

Subsequently the plaintiffs voluntarily dismissed their claims for damages, and all parties then submitted the permanent injunction issue on the evidence presented at the previous hearings.

On July 10, 1987 a final order was filed permanently enjoining the named defendants and the defendant class from:

1. Blocking or interfering with the access or egress of any individual going to or from The Dayton Women's Health Center;
2. Blocking or interfering with the driveway of The Dayton Women's Health Center;



3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;
4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs, or using any sign urging motorists to honk;
5. Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside The Dayton Women's Health Center;\_\_\_\_\_
6. Trespassing on the property of The Dayton Women's Health Center;

[No. 10579, 6]

7. Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers;
8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients, employees, staff or volunteers of The Dayton Women's Health Center or of physicians performing services at The Dayton Women's Health Center;
9. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at The Dayton Women's Health Center in groups of more than five individuals;

10. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within viewing of The Dayton Women's Health Center;

11. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility;

12. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center in groups of more than ten (10) individuals.

For purposes of this injunction, the term "picketing" includes, but is not limited to, parading, parking or any other form of demonstration. In fact, "picketing" goes to the mere presence of an individual.

The defendants have appealed. They have presented seven assignments of error. The first is:

**THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND ALL PERSONS BY CERTIFYING THE DEFENDANT CLASS AND ISSUING AN INJUNCTION AGAINST ITS MEMBERS.**

The order of January 15, 1987 determining that this case may be maintained as a class action was a final appealable order.

[No. 10579, 7]

*Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253. No notice of appeal was filed from that order within thirty days as required by App. R. 4(A). We have held that the order determining that a case may be maintained as a class action cannot be reviewed after the time for an appeal from the certification order has expired. *State ex rel. Randolph Storm v. The City of Dayton* (Dec. 21, 1981), Mont. App. No. 7308, unreported.

The first assignment of error is overruled.

The second assignment of error provides:

THE TRIAL COURT ERRED TO THE  
PREJUDICE OF THE DEFENDANTS  
AND DEFENDANT CLASS MEMBERS  
BY ISSUING UNCONSTITUTIONALLY  
VAGUE AND CONTENT BASED  
RESTRICTIONS ON EXPRESSIVE  
ACTIVITY.

We agree with the appellants that the trial court recognized that time, place and manner restrictions on

expressive activity must be content neutral to meet constitutional standards. *United States v. Grace* (1983), 461 U.S. 171. However, we disagree with the appellants' assertion that the injunction in this case was a content based restriction simply because its application was limited to the right-to-life advocacy defendants and pro-choice advocates were not so limited. Appellants have cited no authority in support of their view and we have found none. The second assignment of error is overruled.

In their third assignment of error, the appellants state:

THE TRIAL COURT ERRED TO THE  
PREJUDICE OF THE DEFENDANTS  
AND DEFENDANT CLASS MEMBERS  
BY ISSUING AN INJUNCTION BASED  
UPON INADEQUATE FACTUAL  
FINDINGS WHICH WERE NOT  
SUPPORTED BY

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THE RECORD.

Under this assignment of error, the appellants contend that the injunction fails to comply with the

specificity requirements of Civ. R. 65(D). They also contend that the findings of the trial court are contrary to the manifest weight of the evidence.

In our view the record reflects substantial compliance with Civ. R. 65(D) and the findings are supported by competent evidence. *Season Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77.

The fourth assignment of error provides:

**THE TRIAL COURT ERRED TO THE  
PREJUDICE OF THE DEFENDANTS  
AND DEFENDANT CLASS MEMBERS  
BY BANNING VERBAL  
COMMUNICATIONS WITH DWHC  
EMPLOYEES.**

Paragraph 7 of the injunction prohibits the defendants from making "Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers."

We agree with the appellants that paragraph 7 is not a time, place, or manner restriction. It in effect prohibits all speech, including public issue speech, in

any forum, including a traditional public forum. This prohibition of protected speech constitutes a prior restraint on speech.

States and courts do not have the power to prohibit peaceful political activity. *NAACP v. Claiborne Hardware Co.* (1982), 458 U.S. 886.

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The United States Supreme Court has repeatedly held that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co. v. Sullivan* (1964), 376 U.S. 254 at 270. This case also makes clear that restrictions in public issue picketing are subject to careful scrutiny.

The fourth assignment of error is sustained.

The fifth assignment of error follows:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND DEFENDANT CLASS MEMBERS BY IMPOSING NUMBERS AND PLACE RESTRICTIONS UPON PICKETING AT THE DWHC AND THE PRIVATE OFFICES OF THE PLAINTIFFS WHICH WERE NOT SUPPORTED BY THE EVIDENCE

AND WHICH ARE  
UNCONSTITUTIONALLY  
OVERBROAD AND VAGUE.

The appellants under this assignment of error are objecting to what appears to us to be content neutral time, place and manner restrictions.

The fifth assignment of error is overruled. *Akron Women's Clinic v. Right to Life of Greater Akron* (May 14, 1985), summit App. No. 12394, unreported. *Akron Center for Reproductive Health v. North Coast Christian Community* (July 9, 1986), Summit App. No. 12414, unreported.

The appellants sixth assignment of error provides:

THE TRIAL COURT ERRED TO THE  
PREJUDICE OF THE DEFENDANTS  
AND DEFENDANT CLASS MEMBERS  
BY IMPOSING A BAN ON ANY  
PICKETING WITHIN VIEWING  
DISTANCE OF THE HOMES OF  
DWHC'S STAFF AND EMPLOYEES.

The total ban on residential picketing contained in the February 27, 1987 amendment to the preliminary injunction was not

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specifically included in the permanent injunction. However, paragraph 8 of the permanent injunction prohibited picketing at or within the viewing distance of the homes of patients, employees, staff or volunteers of the Center. The order further defined "picketing" in broad terms to include "the mere presence of an individual."

The record does not reflect where all of the employees or any of the patients of the center reside. There was testimony that the center has approximately fifty patients per week and that the center has been operating since 1973.

It is reasonably clear that one of the purposes of the injunction in this case was to preserve privacy and tranquility in the home. It is also reasonably clear that speech involved in this case was essentially public issue speech, *i.e.*, speech that participates in the process of representative democracy.

It may be that the mere fact that streets are residential might support more stringent restrictions on public issue picketing than non-residential street;



however, it is "clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood." *Frisby v. Schultz* (1988), 101 L.Ed 2d 420.

In *Frisby v. Schultz*, the Supreme Court upheld an ordinance banning "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Employing the principle that legislation should be given a narrow construction

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so as to avoid constitutional difficulties, the Supreme Court interpreted "picketing" to be "posting at a particular place," to wit: a particular residence. So interpreted, the picketing prohibited by the ordinance would consist of "having the picket proceed on a definite course or route in front of a [particular] home." 101 L.Ed. 2d 431.

General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, was held not to have been prohibited by the ordinance. *Id.* The significance of this

interpretation of the ordinance was that, as so interpreted, the ordinance permitted the more general dissemination of a message. Only focused picketing taking place solely in front of a particular residence was prohibited. The Supreme Court held that the limited prohibition contained in the ordinance appropriately balanced the picketers' free speech interests with the resident's right to privacy, because it achieved the latter interest without impermissibly infringing the former.

In the case before us, the trial court's express definition of picketing, and the express scope of the restrictions on picketing, are much broader. Picketing is defined in the order to include the dissemination of literature and oral speech, activities not by their nature directed toward a particular residence. The order prohibits picketing, so defined, "at or within the viewing distance of the homes of patients \* \* \*, employees \* \* \* and physicians \* \* \* at The Dayton Women's Health

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Center."

By its express terms, the trial court's order is too broad to be saved by a narrowing construction, as in *Frisby v. Schultz*. The general, door-to-door residential campaign, not directed at any particular residence, envisioned in *Frisby* as being an available alternative exercise of free speech rights, is not available in the case before us, since the order, by its express terms, prohibits such activity within viewing distance of the homes of the patients, employees and physicians at the Center, and the defendant has no way of determining where those homes are located.

The injunction in this case in effect prohibits a prudent defendant from public issue picketing on public street in residential areas, and as such, impermissibly infringes upon a prudent defendant's exercise of his First Amendment right of free speech.

The sixth assignment of error is sustained.

The appellants last assignment of error is:

**THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANTS AND DEFENDANT CLASS MEMBERS BY IMPOSING VOLUME RESTRICTION UPON THEIR SPEECH WHICH WERE**

**NOT SUPPORTED BY ITS FINDINGS  
AND WHICH ARE  
UNCONSTITUTIONALLY VAGUE  
AND OVERBROAD.**

Paragraph 5 of the injunction prohibits the defendants from "speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside the Dayton Women's Health

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Center."

This volume restriction of speech is content neutral. It focuses on the manner of expression.

We agree with appellants, however, that as written, paragraph 5 of the injunction is overbroad. It prohibits verbal communications outside the Center that are heard within, even though it is not reasonably foreseeable that they would be heard within.

Appellants point out that the Center has been known to open its windows during the summer months.

Faced with otherwise reasonable volume restrictions that it found to be overbroad, the United States Court of Appeals for the Ninth Circuit in a

recent case modified the order consistently with its overbreadth concerns. *Portland Feminist Women's Health Center v. Buhler* (Oct. 6, 1988), 9th Cir. No. 86-4102, 57 U.S.L.W. 2239. We are permitted to do the same in the case before us, by virtue of App. R. 12(A), which provides that a court of appeals may modify the judgment of a trial court. Accordingly, we elect to modify paragraph numbered 5 of the injunction to read as follows:

5. Speaking, chanting, yelling or verbally communicating in any manner designed or intended to reach the staff or patients or volunteers inside The Dayton Women's Health Center, or in such a volume that it is reasonably apparent that the communications, are likely to be heard by the staff or patients or volunteers inside The Dayton Women's Health Center.

So modified, the restrictions contained in paragraph 5 are

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reasonable.

The last assignment of error is sustained.

The permanent injunction issued July 10, 1987 is amended by amending paragraph numbered 5 as set

forth above, and by deleting paragraphs numbered 7 and 8. As amended, the order is affirmed.

FAIN, J., concurs

KERNS, J., dissenting in part and concurring in part:

While the residential character of a street may support reasonable time, place, and manner restrictions, it is beyond the power of government, including the courts, to completely close a public forum to constitutionally protected first amendment rights. *Frisby v. Schultz*, 101 L.Ed 2d 420. Hence, this case turns upon the reasonableness of the proscriptions contained in the injunction entered by the Common Pleas Court on July 10, 1987.

In balancing the first amendment rights and privacy rights of the plaintiffs and defendants, I have encountered no difficulty with the restrictions imposed by the first, second, third, fourth, sixth, ninth, and twelfth parts of the injunctive order, but in my opinion, the fifth, seventh, eighth, tenth, and eleventh parts of

the injunction are too vague and overbroad to survive constitutional scrutiny. In fact, the notation in the injunction order itself that picketing "goes to the mere presence of an individual" appears to infringe unnecessarily and impermissibly upon free speech.

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Accordingly, I would overrule the first and second assignments of error and sustain the third, fourth, fifth, sixth and seventh assignments of error. Then, pursuant to Civ. R. 65(D), the cause should be reversed and remanded to the trial court for an injunction which describes in detail the acts sought to be restrained and gives specific guidance to the parties to the action.



# The Supreme Court of Ohio

1990 TERM

To wit: June 20, 1990

Dayton Women's	:	
Health Center et al.,	:	
Appellees,	:	Case No. 89-221
v.	:	MANDATE
David Enix et al.,	:	
Appellants.	:	

To the Honorable Court of Appeals

Within and for the County of Montgomery, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

COSTS:

Motion Fee, \$20.00, paid by Melinda Berry.

(Court of Appeals No. 10579)

/s/ Thomas J. Moyer

Thomas J. Moyer  
Chief Justice



# The Supreme Court of Ohio

1990 TERM

To wit: June 20, 1990

Dayton Women's  
Health Center et al.,  
Appellees,

:

:

: Case No. 89-221

v.

: JUDGMENT ENTRY

: CERTIFIED BY THE

: COURT OF APPEALS

David Enix et al.,  
Appellants.

:

:

This cause, here on certification of conflict by the Court of Appeals for Montgomery County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellees recover from the appellants their costs herein expended; and that a mandate be sent to the Court of Appeals for Montgomery County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Montgomery County for entry.

(Court of Appeals No. 10579)

/s/ Thomas J. Moyer

Thomas J. Moyer  
Chief Justice

DAYTON WOMEN'S HEALTH CENTER ET AL., APPELLEES,  
V. ENIX ET AL., APPELLANTS.

[Cite as Dayton Women's Health Ctr. v. Enix (1990), 52  
Ohio St. 3d 67.]

*Civil procedure - Class actions-Determination that  
action shall or shall not be maintained as class  
action is a final appealable order-Civ. R. 23(C)  
and App. R. (A).*

O.Jur 3d Appellate Review Sec. 64.

An order of a trial court, pursuant to Civ. R. 23(C),  
determining that an action shall or shall not be  
maintained as a class action, is a final appealable  
order, and a party must appeal such an order  
within thirty days pursuant to App. R. 4(A).  
(*Amato v. General Motors Corp.* [1981], 67 Ohio  
St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452,  
syllabus, approved and followed; *Roemisch v.*  
*Mutual of Omaha Ins. Co.* [1974], 39 Ohio St. 2d  
119, 68 O.O. 2d 80, 314

[52 Ohio St. 3d 68]

N.E. 2d 386, syllabus, approved and followed; R.C.  
2505.02, construed and applied.)

(No. 89-221-Submitted February 14, 1990 - Decided June 20, 1990.)

CERTIFIED by the Court of Appeals for Montgomery County, No. 10579.

The Dayton Women's Health Center, Inc. ("DWHC") is a non-profit corporation located in Dayton, Ohio. The DWHC provides reproductive health care services, including pregnancy tests, pelvic examinations, medical evaluations, and early pregnancy terminations (abortions).

Beginning in June 1986, defendants-appellants, David Enix, Jim Mehaffie, David Mehaffie, H.F. Perkins and other unnamed individuals began picketing at the DWHC. Allegedly, appellants began trespassing, threatening others with violence, and creating excessive noise which interfered with the center's operations. Before the lawsuit was filed, there were as many as seventy persons or more demonstrating at or around the DWHC.

On October 14, 1986, plaintiffs-appellees, Dayton Women's Health Center and its staff doctors, K.W. Davis, M.D., and Robert Skipton, M.D., filed a complaint, later amended, requesting that a preliminary and permanent injunction be issued, as well as damages assessed, against appellants. At that time, appellees moved to have the case certified as a defendant class action.

The trial court then conducted hearing son appellants' motion to strike the class allegations and appellees' motion for a preliminary injunction. On January 15, 1987, the court certified a defendant class defined as "all individuals protesting the activities conducted at the Dayton Women's Health Center \* \* \* who have been personally served with this entry \* \* \* " and issued a preliminary injunction against appellants which included the certified class. Subsequently, on January 22, 1987, the court issued a supplemental

order which detailed a procedure for adding members to the defendant class.<sup>1</sup>

Next, appellees filed a motion to modify the court's injunction in order to conform to certain alleged misconduct by appellants. On March 16, 1987, the court issued its decision and entry supplementing and modifying its original injunctive order.

After the filing of various contempt motions, and motions to dismiss and to compel discovery, the appellees voluntarily dismissed their claims for money damages pursuant to Civ. R. 41(A)(1), and allowed the case to be submitted to the court on their request for a permanent injunction on the evidence submitted at the previous evidentiary hearings. On July 10, 1987, the court issued a decision and entry ordering the

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1 The trial court provided in its supplemental order that "[t]he Dayton Women's Health Center employ the following procedure for adding members to the defendant class:

"1. Any employee of The Dayton Women's Health Center is hereby designated as an agent of this Court for the purpose of personally serving a copy of this Entry and Preliminary Injunction on any individual found to be protesting the activities conducted at The Dayton Women's Health Center. "

appellants, which included the defendant class members, permanently enjoined in accordance

[52 Ohio St. 3d 69]

with the previous orders of the court. In its entry the court also overruled appellants' motion to decertify the class. The appellants, who also represented the defendant class members, then appealed the trial court's decision.

The court of appeals modified and affirmed the permanent injunction, and further held that the defendant class members failed to properly bring an appeal of their class certification. Specifically, the court held the January 15, 1987 order certifying the defendant class was a final appealable order, which required the class members to appeal within thirty days of the certification under App. R. 4(A).

The court of appeals, finding its decision to be in conflict with the decision of the *Court of Appeals for Hamilton County in Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (June 27, 1986), No.

C-860430, unreported, certified the record of the case to this court for review and final determination.

*Bieser, Greer & Landis* and *David C. Greer*, for appellees.

*Thomas E. Grossmann* and *Robert Huffman*, for appellants.

*Robert R. Melnick, Kenneth Shaw* and *John W. Whitehead*, urging reversal for *amicus curiae*, Rutherford Institute of Ohio.

HOLMES, J. The sole issue certified for our review is whether the certification of a defendant class action is a final appealable order that *must* be appealable within the time allotted under App. R. 4(A).<sup>2</sup> For the reasons which follow, we decide that such class certifications are final appealable orders

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<sup>2</sup> Although appellants argue several propositions of law related to the range and extent of the permanent injunction, we choose only to address the sole question certified to us by the court of appeals.

which *must* be appealed within thirty days pursuant to App. R. 4(A).

"Final appealable orders" are defined in R.C. 2505.02, as follow:

"An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial. \* \* \*"  
(Later amended March 1987.)

This court addressed the issue of the appealability of class certifications in *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, syllabus, by holding that "[a]n order of a trial court, pursuant to Civ. R. 23(C)(1), determining that an action may be maintained as a [plaintiff] class action is a final, appealable order, pursuant to R.C. 2505.02." In deciding that class



certifications are in effect special proceedings under R.C. 2505.02, the *Amato* court announced a balancing test to be applied in these proceedings:

"This test weighs the harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from the allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable." *Id.* at 258, 21 O.O. 3d at 161, 423 N.E. 2d at 456.

Similarly, in *Roemisch v. Mutual of Omaha Ins. Co.* (1974), 39 Ohio St. 2d 119, 68 O.O. 2d 80, 314 N.E. 2d 386, syllabus, this court held that an order denying plaintiff class action status was a final appealable order under

[52 Ohio St. 3d. 70]

R.C. 2505.02, since "such [an] order clearly affects a 'substantial right' of *the class* which 'in effect determines the action and prevents a judgment' adverse or favorable to *the class*." (Emphasis *sic*.) *Id.* at 122, 68 O.O. 2d at 81, 314 N.E. 2d at 388. Therefore, pursuant

to R.C. 2505.02 an appeal will lie directly from an order certifying or denying class action status.

Although *Amato* and *Roemisch* dealt with the appealability of plaintiff class actions, we find little reason not to apply the holding in those cases to defendant class actions. Clearly, the potential plaintiff or defendant will be equally prejudiced in asserting his or her rights in a defendant or plaintiff class action depending on the certification ruling by the trial court. See, e.g., *Planned Parenthood Assn. of Cincinnati v. Project Jericho* (1990), 52 Ohio St. 3d 56, \_\_\_ N.E. 2d \_\_\_. (Plaintiff requested that defendant class action be certified in order to enjoin the defendant class from engaging in certain conduct.) Usually, defendant class actions are requested in suits seeking injunctive relief under Civ. R. 23 (B)(2) when there are several defendants who have been charged with a common responsibility for implementing or enforcing a particular challenged code provision or who have otherwise acted in common under an industry-wide practice or collective bargaining agreement, or have had some other

interrelationship to one another that bears directly on the challenged conduct in the litigation. 1 Newberg, Newberg on Class Actions (2 Ed. 1985) 133, Section 3.02. Both plaintiff and defendant class actions arise because of the litigation strategies adopted primarily by the plaintiff's counsel under the particular circumstances. Furthermore, "[w]hether the action is claimed to be a class action is solely of plaintiff's choosing, although the defendant may request class treatment in unusual circumstance." Alpert, Class Action Manual (National Consumer Law Center 1977) 190, quoted in Newberg on Class Actions, *supra*, at fn. 23.

Appellants assert that although a class determination is a final appealable order, "an immediate appeal from an order certifying a defendant class is permissive, not mandatory." We disagree. Ohio's App. R. 4(A) states in pertinent part that: "In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment *or order appealed from*." \*

\* \*" (Emphasis added.) Clearly, App. R. 4(A) requires that an appeal be filed within thirty days of a final appealable order.<sup>3</sup> Thus, an order of a trial court, pursuant to Civ. R. 23(C), determining that an action shall be maintained as a class action, is a final appealable order, and a party must appeal such an order within thirty days of the date of entry pursuant to App. R. 4(A).

In the case *sub judice* appellants failed to appeal the January 15, 1987 certification of the defendant class. Instead, they chose to appeal the propriety of the certification on July 10, 1987, when the trial court issued a decision and entry permanently enjoining the defendant class members. Consequently, appellants waived their right to challenge the class certification on appeal.<sup>4</sup>

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<sup>3</sup> We recommend that the rules Advisory Committee appointed by this court review whether an amendment to App. R. 4(A) should be adopted in order for a party to have the option of appealing an interlocutory final appealable order after final judgment is rendered in a case.

<sup>4</sup> Under App. 3(A) the court of appeals is permitted to dismiss cases where appellants have failed to timely file their appeals. App.R.3(A) provides: "An appeal as

Therefore, for the foregoing reasons, the decision of the court of appeals is affirmed as to the issue on certification.

*Judgment affirmed.*

MOYER, C.J., WRIGHT and H. BROWN, JJ.,  
concur.

H. Brown, J., concurs separately.

*Sweeney, Douglas and Resnick, JJ., dissent.*

H. BROWN, J., concurring. I join the syllabus and opinion. An order certifying a class action, if it affects a substantial legal right, qualifies as a special proceeding under R.C. 2505.02 and is thus appealable. This was the holding in *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452. That decision has stood for nine years and has neither

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of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.

undermined the stability of the law nor bred great confusion. I am not prepared to overrule *Amato*.

I write separately because I believe the Ohio law with respect to final appealable orders presents a dilemma when applied to class action issues. If the order certifying a class action is not immediately appealable, the results of a protracted, complex trial (which class actions usually are) could be nullified by an error in the certification which bears no relationship to the validity of the claims of class members (perhaps numbering into the thousands) on the merits.

On the other hand, if certification orders are immediately appealable, an appeal could be used as a tool to delay proceedings.

There is the further problem presented by amendments to class certification. Each time a modification is made to a class order, is that appealable? I do not read today's decision as a definitive resolution of all appealability questions which may arise from class action determinations.

The problem, as applied to class actions, stems from the requirement in Ohio that an order be classified as appealable (in which case an appeal must be taken or lost) or nonappealable (in which case no appeal may be taken) regardless of the desirability of having the issue determined before the resources of the parties and the court are expended on the merits.

What is needed is a rule which would make immediate appeals of class certifications permissible but not mandatory. Discretion should be given to the trial judge to determine when the interests of justice and judicial economy will be served by review of a class action order before launching into the trial on the merits.

Such an approach is permitted in the federal courts. Federal district courts may certify for appeal to the courts of appeals an order certifying a class, pursuant to Section 1292, Title 28, U.S. Code, which states in part:



"(b) When a district judge, in making in a civil action an order no otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may

[52 Ohio St. 3d. 72]

materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Other states have adopted rules which attempt to solve the peculiar "appealability" problems presented in class actions. See, *e.g.*, Ar. App. R. 2(a)(9); Ga. Ct.



App. R. 29; Ill. Supreme Court Rule 308; Ind. App. R. 4(B)(6); and Tex. App. R. 43(a).

I urge the consideration of a rule in Ohio which would avoid the necessity of choosing between the positions taken in today's case by the majority and dissenting opinions. Until such time as a rule change is accomplished, however, I believe that we should adhere to precedent and that orders certifying a class action are appealable under the "special proceeding" language of R.C. 2505.02.

DOUGLAS, J., dissenting. *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, was improperly decided by this court and the majority's continued reliance upon it breeds confusion and promotes uncertainty in an area of law which is in great need of clarification and stability. In my judgment, *Amato* should be overruled, and I stand ready to do so.

R.C. 2505.03(A) states, in relevant part, that "[e]very final order \* \* \* may be reviewed on appeal \*

\* \* \*  
"

R.C. 2505.02<sup>5</sup> defines what types of orders are final: (1) an order affecting a substantial right in an action which in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding or made upon summary application after judgment; or (3) an order vacating or setting aside a judgment or granting a new trial. See *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St. 3d 86, 87-88, 541 N.E. 2d 64, 67. The issue presented in the case at bar concerns only the *second* part of R.C. 2505.02 - an order affecting a substantial right made in a *special proceeding* or made upon summary application after judgment.

The court in *Amato* announced a "balancing test" to be utilized in determining whether an order is made in a "special proceeding." The balancing test "\* \* \*

5 R.C. 2505.02 provides in relevant part:

"An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial."

weighs the harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from the allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable." *Id.* at 258, 21 O.O. 3d at 161, 423 N.E. 2d at 456. Certainly, this court can devise a definition for "special proceeding" which will not depend upon which way the *Amato* scale of justice tips on any given day. The *Amato* balancing test is comprised of nothing

[52 Ohio St. 3d. 73]

more than meaningless verbiage to the practicing attorney who has received an order and must decide whether or not to file a notice of appeal.

According to *Amato*, a proceeding is defined as "special" (or not "special") only when a majority of a reviewing court finds that the balance tips in favor of review, and when the reviewing court is a court of appeals even that decision can be changed by this court on appeal. If the balance tips in favor of review, any order affecting a substantial right which was rendered in

a civil proceeding is a final appealable order which must be appealed within thirty days.<sup>6</sup> What about members of the bar in this state who never timely file notices of appeal regarding an order made in a proceeding thinking all the while that the *Amato* balancing test would tip in one direction and then, sometime thereafter, a reviewing court rules that the proceeding was "special"? The answer is, of course, that appeal rights are forever lost and colorable claims for malpractice arise. Hence, there are two lessons to be learned from *Amato*. First, every order that affects a substantial right in *any* proceeding should immediately be appealed since what may be defined as an order made in a "special proceeding" may change day to day under *Amato*. In this vein, *Amato* makes the filing of a notice of appeal like attempting to shoot a moving target. The other lesson *Amato* teaches us is that the payment of malpractice insurance premiums for practicing attorneys is essential.

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<sup>6</sup> See App. R. 4(A).

In my judgment, this court should strive to promote clarity and stability in the law. Today's majority opinion simply runs afoul of these notions by relying on *Amato*.

The General Assembly has determined that orders affecting a substantial right made in a "special proceeding" are final orders which may be appealed. On occasion, this court has made certain proceedings "special proceedings" regardless of whether the given proceeding was "special" at all. Today, the majority takes what may be the ultimate step in this dangerous direction.

A "special" proceeding is a proceeding which is unusual or extraordinary. See *e.g.*, Black's Law Dictionary (5 Ed. 1979) 1253. In *State v. Thomas* (1980), 61 Ohio St. 2d 254, 15 O.O. 3d 262, 400 N.E. 2d 897, paragraph one of the syllabus, this court held that denial of a motion to dismiss a criminal charge, based upon a claim of double jeopardy, is a special proceeding. This court has also granted a party the right to immediately appeal an adverse ruling on a

discovery matter, as an order made in a special proceeding. See *Humphrey v. Riverside Methodist Hospital* (1986), 22 Ohio St. 3d 94, 22 OBR 129, 488 N.E. 2d 877. Now the majority of this court holds that an order, pursuant to Civ. R. 23, *granting* class action status is an order made in a special proceeding.

There is absolutely nothing "special" about proceedings under the Rules of Criminal or Civil Procedure. There is nothing unusual or extraordinary about proceedings that are a part of our everyday civil or criminal practice.<sup>7</sup>

As I have stated on a previous occasion, I believe that:

"A special proceeding is an action

[52 Ohio St. 3d 74]

not recognized at common law or part of our standard civil practice. It is one that has been brought about by specific legislation which creates a special type of action.

<sup>7</sup> For an additional case, *not* based on either the Civil or Criminal Rules, creating yet another exception to the final appealable order rule, see *Tilberry v. Body* (1986), 24 Ohio St. 3d 117, 24 OBR 308, 493 N.E. 2d 954.

Examples would be forcible entry and detainer, declaratory judgment, appropriation or \* \* \* arbitration." *Stewart v. Midwestern Indemn. Co.* (1989), 45 Ohio St. 3d 124, 128, 543 N.E. 2d 1200, 1204 (Douglas, J., dissenting).

Therefore, a special proceeding is an action: (1) which has been brought about by specific legislation creating a special type of action; (2) *and is either* (a) not recognized at common law, *or* (b) not part of our standard civil (or criminal) practice. An order *granting* certification of a defendant (or plaintiff) class does not meet this definition.

Class actions are governed by Civ. R. 23. Civ. R. 23 was created not by specific legislation but, rather, was adopted in Ohio by legislative inaction. See Section 5(B), Article IV, Constitution. As such, a class action proceeding is not a special proceeding. Further, merely for purposes of discussion, the class action proceeding in question *is* part of our standard civil practice and a proceeding in the nature of granting certification of a defendant class *did* exist at common law in the form of



equitable bills of peace.<sup>8</sup> Accordingly, the proceeding in question not only fails the first prong of the special

8 At common law, a bill of peace could be sought to avoid a multiplicity of legal actions. The bill provided a mechanism in which similar claims asserted by a plaintiff against a multitude of defendants could be determined in one equity suit. See 1 Pomeroy Equity Jurisprudence (5 Ed. 1941), Sections 245 *et seq.*; Chafee, Bills of Peace With Multiple Parties (1932), 45 Harv. L. Rev. 1297 ("The King of Brobdingnag gave it for his opinion that, 'whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together.' In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before. A potent device for this purpose is the bill of peace in equity."); and 27 American Jurisprudence 2d (1966) 574-575, Equity, Section 51.

The granting of the bill of peace would, in effect, result in the joinder of multiple defendants and the plaintiff's claims against all defendants could be maintained in one consolidated lawsuit. The granting of a bill of peace was, therefore, much like the granting of certification of a defendant class. See Civ. R. 23. Indeed, it has been said that Fed. R. Civ. P. 23 is a product of the equitable bill of peace:

"Defendant class actions have a long and rich history in English common law. The earliest class actions, or bills of peace in the nature of class actions, brought in English Chancery Courts of the seventeenth and eighteenth centuries were largely defendant class actions in which the plaintiff needed to join numerous parties defendant in order to receive an effective remedy.\* \* \*

"Defendant class actions have a long history in the United States. As early as 1853, the Supreme court



proceeding test outlined above (which is dispositive of the matter) but also fails both alternative parts of the second prong.

I agree with today's majority that the *denial* of a class certification is ap-

[52 Ohio St. 3d. 75]

pealable as a final order. In my view, the issue concerning the denial of class certification was not properly before this court given the facts of the case *sub judice*, but I pass judgment on the issue only to clarify the distinction between *granting* and *denying* class certification.

As indicated, there are three types of orders which are final. An order *granting* or *denying* class certification is not a final order of the second type (an

---

in *Smith v. Swormstedt* [(1853), 57 U.S. (16 How.) 288] upheld an action by a plaintiff class against a defendant class noting the well-established common law rule which permits such class suits. Authority for plaintiff and defendant classes was codified in Federal Equity Rule 38, recodified in Federal Rule of Civil Procedure 23, and carried forward to current Rule 23 in the 1966 amended version." (Footnotes omitted.) Newberg, 1 Newberg on Class Action (2 Ed. 1985) 373-375, Section 4.45.

order affecting a substantial right made in a special proceeding) because such an order is made in a proceeding which is not "special." Nor is an order *granting* class certification a final order of the first type (an order affecting a substantial right in an action which in effect determines the action and prevents a judgment). An order allowing a lawsuit to be maintained as a class action does not determine the action or prevent a judgment. The order simply does neither but, rather, the order granting class status is a necessary step to a final determination of the class action lawsuit.

Conversely, an order *denying* class certification is a final order of the *first* type because the order affects a substantial right of the class and in effect determines the action and prevents a judgment for the class. See *Roemisch v. Mutual of Omaha Ins. Co.* (1974), 39 Ohio St. 2d 119, 122, 68 O.O. 2d 80, 81, 314 N.E. 2d 386, 388. Therefore, an order *denying* class certification is a final order of the *first* type, but not the second;

whereas, an order *granting* class certification is not a final order of either the first or second type.

Finally, even if I were to accept the balancing test of *Amato* as a determinant of whether a given order is made in a special proceeding, I believe that the test as applied to orders granting class certification balances in favor of no immediate review. If an order granting class certification is immediately appealable, the class action lawsuit may never be finally litigated. A certification order can be altered, amended, modified or vacated and each change in the class or creation of a new subclass would result, if objected to, in numerous new appeals. Delays in the class action lawsuit could last indefinitely. Such delays and the consequent waste of judicial resources, if the class is decertified or the order is vacated, weigh heavily against permitting immediate appeals. On the other hand, review after final judgment is practicable, in that it would promote the prompt and orderly disposition of the litigation, and far fewer judicial resources would be used, with none being wasted.

For the foregoing reasons, I dissent.

SWEENEY, J., concurs in the foregoing dissenting opinion.

ALICE ROBIE RESNICK, J., dissenting. I respectfully dissent from the majority's holding that an order, "pursuant to Civ. R. 23(C) determining that an action *shall* or *shall not* be maintained as a class action, is a final appealable order \* \* \*." (Emphasis added.) A ruling that an action may be maintained as a class action is totally different from the denial of certification. Hence, I cannot initially accept that they both should be treated the same on the issue of appealability as final orders.

The majority bases its holding on *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, wherein it was held that certification affects a substantial right and is made in a special proceeding. I agree that class certification affects a substantial right. However, I do not agree that

it is done in a "special proceeding." Additionally, I can find no

[52 Ohio St. 3d. 76]

support for such a holding concerning class certification either in Ohio or other jurisdictions.

Recently this court determined that an order in a declaratory judgment action pursuant to R.C. Chapter 2721 affected a substantial right in a special proceeding in *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St. 3d 17, 540 N.E. 2d 266. However, a declaratory judgment is an independent action determining legal rights. This is not the case with certification of a class action, which is a preliminary procedure. To term a preliminary procedure provided by rule a special proceeding would consequently have broad ramifications and open the door to a flood of piecemeal appeals.

Consequently, if class certification is not a special proceeding, in order for it to be a final order, we must consider the remaining criteria found in R.C. 2505.02 which define final orders other than ones made in

special proceedings. R.C. 2505.02 defines "final order" as including "[a]n order that affects a substantial right in an action which in effect determines the action and prevents a judgment \* \* \* ." Class certification does neither. We simply have to look to Civ. R. 23(C)(1), which provides as follows:

"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision *may be conditional, and may be altered or amended before the decision on the merits.*" An order which may be changed or modified is interlocutory.

"\* \* \* An interlocutory judgment is provisional or preliminary; it is made before a final decision, for the purpose of ascertaining a matter of law or fact preparatory to a final judgment, or it determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of court.

\* \* \* For some purposes, a judgment is not regarded as final until expiration of the period which the judgment remains *within the inherent power of the court to modify or vacate* \* \* \*." (Footnotes omitted; emphasis added.) 47 American Jurisprudence 2d (1969) 123-124, Judgments, Section 1053.

From this it can be seen that certification of a class neither determines the action nor prevents a judgment. At any time during the proceedings the court can decertify part or all of the class. It would be wholly inconsistent with a considerable line of cases to hold that if a party opposing certification does not appeal within thirty days of certification its right to appeal is lost. The reason is that at any time during trial of the certified class action the court may change its previous order. There would be no reason for a party to attempt an appeal from such an obviously interlocutory order.

Other jurisdictions have held that certification of a class action is not immediately appealable. The court

in *Pincus v. Mut. Assurance Co.* (1974), 457 Pa. 94, 321 A. 2d 906, stated:

"We note at the outset that an order permitting a suit to proceed as a class action is not only an interlocutory order, but also that it is the type of interlocutory order which is not usually appealable. *Piltzer v. Independence Federal Savings and Loan Association*, 452 Pa. 402, 319 A. 2d 677 (1974). See also *Thill Securities Corp. v. New York Stock Exchange*, 469 F.2d 14, 17 (7th Cir. 1972); *Walsh v. Detroit*, 412 F.2d 226 (6th Cir. 1969); 9 J. Moore, *Federal Practice* 110.13[9], at 184-87 (2d Ed. 1973)." *Id.* at 96-97, 321 A. 2d at 908.

"Since the appellants' claim is, in

[52 Ohio St. 3d. 77]

reality, an objection to the propriety of the class action, it can properly be resolved on appeal after final judgment below. To hold otherwise would encourage piecemeal determinations and consequent protraction of litigation. *Piltzer, supra.*" *Id.* at 98, 321 A. 2d at 909.



Arizona has a statute similar to Ohio's as to final judgments. Section 12-2101, Ariz. Rev. Stat. Additionally, Arizona R. Civ. P. 23(c)(1) is identical to Ohio's in that it provides that such an order "may be altered or amended before the decision on the merits." Arizona has also held that denial of a motion for decertification of a class is an interlocutory order and cannot be immediately appealed since it neither determines the action nor prevents a judgment. See *Eaton v. Unified School Dist. No. 1 of Pima Cty.* (App. 1979), 122 Ariz. 391, 595 P. 2d 183, affirmed (1979), 122 Ariz. 377, 595 P. 2d 169.

This court in *Roemisch v. Mutual of Omaha Ins. Co.* (1974), 39 Ohio St. 2d 119, 68 O.O. 2d 80, 314 N.E. 2d 386, held in the syllabus that: "An order of a trial court, pursuant to Civ. R. 23(C)(1), determining that an action may not be maintained as a class action is a final, appealable order, pursuant to R.C. 2505.02." Other jurisdictions have similarly held that denial of class certification is final. See *Darr v. Yellow Cab Co.* (1967), 67 Cal.2d 695, 63 Cal. Rptr. 724, 433 P. 2d 732

(the California Supreme Court concluded that a class action termination order was in legal effect a final judgment from which an appeal lies); *Reader v. Magma-Superior Copper Co.* (1972), 108 Ariz. 186, 494 P.2d 708; *McConnell v. Commonwealth of Pennsylvania, Dept. of Rev.* (1983), 503 Pa. 322, 469 A. 2d 574; *In re Estate of Freedman* (1982), 307 Pa. Super. 413, 453 A. 2d 651. The reasoning that such orders are final is usually based upon the "death knell" theory which was rejected in *Coopers & Lybrand v. Livesay* (1978), 437 U.S. 463, 477, wherein the court stated that:

"Accordingly, we hold that the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not sufficient reason for considering it a 'final decision' within the meaning of 1291 [, Title 28, U.S.]." Thus, this issue was settled in the federal courts. The *Livesay* decision also commented on the fact that under Fed. R. Civ. P. 23 (c)(1) an order involving class status may be "altered or amended before the decision on the merits." *Id.* at 469,

fn. 11. Even if a *denial* of certification of a class were immediately appealable on the basis that the denial prevented a judgment and was a death knell to the action, there is no basis for similar treatment of a *grant* of certification.

In the instant case the trial court certified the class of defendants. The defendants proceeded with the case and did not attempt to seek an immediate appeal. The majority now chooses to affirm the dismissal of defendants' appeal, relying on the holding of *Amato, supra*.

If we were to accept that class certification is a special proceeding we still would not have a final appealable order since the trial court pursuant to Civ. R. 23(C)(1) may change its order of certification at any time prior to a decision on the merits. Such an order is clearly interlocutory and cannot be considered a final appealable order under R.C. 2505.02. It is interesting to note that an Illinois Supreme Court Rule succinctly

accomplishes what this court is trying to do through case law.<sup>9</sup>

[52 Ohio St. 3d. 78]

To allow this appeal now is for this court to engage in judicial legislation. R.C. 2505.02 was never intended to apply to actions such as the one before this court.

Based upon the foregoing, I would allow the appellant the right to raise the issue of class certification and would decide this issue upon the merits.

---

<sup>9</sup> The Illinois Supreme Court has adopted Supreme Court Rule 308 which allows interlocutory appeals in certain circumstances.

"Interlocutory Appeals by Permission

"(a) Requests. When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order." Cf. Section 1292(b), Title 28, U.S. Code.

③  
No. 90-758

Supreme Court, U.S.  
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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1990

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DAVID ENIX, JAMES MEHAFFIE, DAVID MEHAFFIE,  
DOUGLAS SAPP, KYM MEHAFFIE and H. F. PERKINS,  
*Petitioners,*

v.

THE DAYTON WOMEN'S HEALTH CENTER, INC.,  
K. W. DAVIS, M.D., and ROBERT SKIPTON, M.D.,  
*Respondents.*

---

**BRIEF IN OPPOSITION TO A PETITION  
FOR A WRIT OF CERTIORARI**

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### **QUESTIONS PRESENTED**

1. Whether the trial court may certify a case as a defendant class action when the named defendants are representative of the defendant class and when all the certification requirements of Ohio Civil Rule 23 are satisfied.
2. Whether the trial court may enter a permanent injunction which places reasonable time, place and manner restrictions on the petitioners' picketing activities which are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.



### III

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IN THE  
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---

**BRIEF IN OPPOSITION TO A PETITION  
FOR A WRIT OF CERTIORARI**

---

**CONSTITUTIONAL PROVISIONS AND STATUTES  
INVOLVED**

In addition to the First Amendment issues identified in the petitioners' writ of certiorari, this case arises out of an interpretation of Rules 23(A) and 23(B) of the Ohio Rules of Civil Procedure, which provide:

(A) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

**(B) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

## STATEMENT OF THE CASE

### A. Procedural Posture

The long procedural history of this case commenced with the respondents' filing of a complaint for a preliminary and permanent injunction on October 14, 1986. At that time, the respondents also moved to have the case certified as a defendant class action.

The petitioners responded to the allegations contained in the respondents' complaint and the trial court scheduled an evidentiary hearing on December 4, 1986. On January 15, 1987, following three days of extensive testimony and the filing of post-trial briefs, the trial court certified a defendant class and entered a preliminary injunction.

Following the entry of a preliminary injunction, the petitioners continued to engage in the type of conduct which necessitated the filing of this lawsuit in the first instance. Their protesting activities spread to the homes of the clinic's physicians and employees. In response to their conduct and after another evidentiary hearing, the trial court supplemented and modified its original injunctive order by adding additional restrictions on the number of permissible protestors and the locations where protesting activity could be conducted. On July 10, 1987, based on the evidence submitted at the previous evidentiary hearings, the trial court permanently enjoined the defendants and defendant class in accordance with the previous orders of the court. *Dayton Women's Health Center v. Enix*, Case No. 86-3120 (Montgomery Cty. C.P. July 10, 1987) (attached to petitioners' appendix.)

An appeal of the permanent injunction was taken to the Court of Appeals of Montgomery County, Ohio. On December 5, 1988, the court affirmed virtually every aspect of the trial court's permanent injunction, with the exception of the restriction prohibiting the petitioners and the class from verbally communicating with employees of the Dayton Women's Health Center without their consent, and the pro-



hibition concerning residential picketing. In addition, the Montgomery County Court of Appeals modified a provision of the permanent injunction relating to the acceptable noise level of the petitioners' activities at the clinic. *Dayton Women's Health Center v. Enix*, Case No. 10579 (Montgomery Cty. C.A. December 5, 1988) (attached to petitioners' appendix.)

The court of appeals' decision concerning the appealability of a class certification order conflicted with a decision of another court of appeals in Ohio, so the case was certified to the Supreme Court of Ohio for review and final determination. Although the case was certified to the Ohio Supreme Court as to the issue of whether an order certifying the case as a defendant class action was a final appealable order, the petitioners brought before the state supreme court all of the issues relating to the propriety of the trial court's class certification order and the scope of the trial court's injunction. The decision of the court of appeals was affirmed on June 20, 1990. *Dayton Women's Health Center v. Enix*, 52 Ohio St. 3d 67, 555 N.E. 2d, 956, *reh. den.*, 53 Ohio St. 3d 706, 558 N.E.2d 61 (1990).

## **B. Statement of Facts**

Both the scope of the injunction and the order certifying a defendant class arose out of a specific set of circumstances detailed in the 814-page trial transcript. The summary of facts outlined by the petitioners does not begin to depict the egregious conduct of the petitioners and defendant class members revealed and documented at the evidentiary hearing.

The Dayton Women's Health Center, Inc., is a non-profit corporation located at 3460 South Dixie Drive, Dayton, Ohio. The center provides a full range of reproductive health care services, including pregnancy tests, pelvic examinations, medical evaluations, and early pregnancy termination. K. W. Davis, M.D., and Robert Skipton, M.D., are medical doctors, licensed to practice medicine in the state of Ohio. The

doctors work at the Dayton Women's Health Center and operate a private practice.

While the Dayton Women's Health Center has often been the site of some peaceful picketing activity, the picketing and protesting activity began to escalate in June 1986. Since that time, the number of picketers progressively increased, their picket signs enlarged, the noise level at the clinic rose, and the persons either working at the clinic or seeking medical services there began to get harassed by members of the defendant class. Additionally, picketers began trespassing and putting literature on cars. What began as peaceful picketing on the grounds of the Center, ultimately got out of control forcing the plaintiffs to file their suit for injunctive relief.

Prior to the filing of the plaintiffs' complaint, the number of protestors at the Dayton Women's Health Center varied. There were occasions when as many as 70 picketers demonstrated at the clinic. On at least one occasion since the complaint was filed, there were 200-300 picketers present. Because of the large number of protestors, it was impractical to join everyone as individual defendants; therefore, the case was submitted to the trial court as a defendant class action. Named as defendants and representatives of the class were: David Enix, Jim Mehaffie, David Mehaffie, Douglas Sapp, Kym Mehaffie and H. F. Perkins. The named defendants were representative of the defendant class and their conduct at the clinic represented the conduct of all class members which the plaintiffs sought to enjoin.

The record in this case is replete with testimony that the named defendants formed the core group of individuals protesting the activities of the Dayton Women's Health Center with the other class members acting in concert and cooperation with them. Indeed, two of the named defendants, Kym Mehaffie and David Enix, were listed in literature as the persons to contact to obtain information concerning picketing activities at the Dayton Women's Health Center. The named defendants supplied picket signs for themselves and the other class members picketing at the clinic. Furthermore, after the



court issued its preliminary injunction, certified the defendant class, and established a procedure for adding additional class members, it was the named defendants who instructed picketers that they need not accept service of the injunction when attempts were made to serve them.

The voluminous transcript in this case graphically demonstrates instances of intimidating and harassing conduct directed at the Center's employees and patients by the named defendants and the defendant class. The picketers have caused traffic problems, regularly trespassed on the property of the Center, and routinely blocked the Center's ingress and egress. Their conduct forced the facility to close on at least three occasions. On a daily basis the picketers have subjected the patients and staff of the clinic to verbal harassment, threats, and intimidation. The abusive, threatening, and intimidating nature of the defendants' conduct has been alarming and frightening to the clinic's staff and patients. The constant and chronic screaming and chanting by the defendants is so loud that it can be heard inside the facility.

The employees of the Dayton Women's Health Center and the patients are referred to as "scum", "murderers" and "killers". On one occasion, a bomb threat was phoned into the clinic and a rock was thrown through the clinic's window. The clinic and the homes of Drs. Skipton and Davis are subjected to harassing and unidentified telephone calls. The homes of Drs. Davis and Skipton, and the homes of other clinic employees, have been the site of active protest activities by the defendants. Reportedly, the defendant Enix followed one of the clinic's employees out of the clinic in his car and screamed that she was a disgrace to her family and profession.

Not surprisingly, the defendants' abusive, harassing, and intimidating conduct has caused the Dayton Women's Health Center and the physicians to lose patients. Moreover, the clinic has had difficulty hiring medical personnel to provide health care at the facility. The conduct of the picketers has

been so extreme that one of the clinic's physicians left his practice at the clinic.

The instances of coercion, harassment, and intimidation inflicted by the named petitioners and defendant class members on the employees and patients of the Dayton Women's Health Center are well documented in the 814-page transcript. Their activities have adversely affected the physical well being of the patients of the clinic and have irreparably harmed the lawful business conducted at the clinic. It was based on those facts that the case was presented to the trial court on the plaintiffs' motion for a preliminary and permanent injunction, and that the permanent injunction, as set forth above, was entered by the trial court.

## ARGUMENT

1. The trial court may certify a case as a defendant class action when the named defendants are representative of the defendant class and all of the certification requirements of Ohio Civil Rule 23 are satisfied.

Throughout the entire history of this lawsuit, the petitioners have contended that the trial court's class certification order was improper because it punishes persons acting independently of the parties without giving them their day in court. In making this argument, the petitioners casually and conveniently ignore the evidence produced at trial which demonstrates that the class representatives actively coordinate the demonstrations at the Dayton Women's Health Center, and that the class members are acting in concert and combination with the named defendants. The evidence conclusively showed that the named defendants constituted the core group of protestors that actively solicited and coordinated the protests at the clinic.

The petitioners' arguments also ignore the concept of a defendant class and deny the power of an equity court to place reasonable restrictions on conduct which infringes the constitutional and common law rights of others. Binding class members in the manner contemplated by the trial court's order is precisely the same as binding new class members in any case where future membership is anticipated. The defendant class in this case is analogous to any labor union or concerted activity where future membership is anticipated. It does not run afoul of any constitutional principles. *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d 56, 556 N.E.2d 157 (1990).

The defendant class action was a necessity in this case because a simple injunction against the named defendants would not have provided the respondents with any meaningful relief because the enjoined conduct would simply be carried on by others whose names were unknown to the respondents, but who acted in concert with the named defen-

dants. The respondents needed injunctive relief that would reach the harassment of the staff and the patients at the Dayton Women's Health Center by the named defendants and by those not named as defendants, but engaging in similar conduct outside of the facility. The appellants have consistently suggested that the respondents should be required to file separate lawsuits against each individual picketer. Such an approach would result in enumerable, duplicative suits, resolving the same factual and legal issues. To avoid protracted and duplicative litigation for equitable relief, the only logical and efficient way to proceed in this case was to certify the defendant class of picketers and protestors who would be bound by the orders of the trial court.

In Ohio, the decision of whether or not to certify a class rests within the sound discretion of the trial court.

Furthermore, while a trial court's determination concerning class certification is subject to appellate review on an abuse-of-discretion standard, due deference must be given to the trial court's decision. A trial court which routinely handles case management problems, is in the best position to analyze the difficulties which can be anticipated in litigation of class actions. It is at the trial court level that decisions as to class definition and the scope of questions to be treated as class issues should be made.

*Marks v. C.P. Chemical Co.*, 31 Ohio St. 3d 200, 201, 509 N.E. 2d 1249 (1987).

Furthermore, a trial court has broad discretion in determining whether a class action may be maintained, and "that determination will not be disturbed absent a showing of an abuse of discretion." *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d at 62; *see also*, *Schmidt v. Avco Corp.*, 15 Ohio St. 3d 310, 312-13, 473 N.E. 2d 822 (1984). An "abuse of discretion" is "more than an error of law or judgment; it implies an attitude on the part of the trial court that is unrea-

sonable, arbitrary, or unconscionable." *Marks v. C.P. Chemical Co.*, 31 Ohio St. 3d at 201, citing, *Ojalvo v. Board of Trustees of Ohio State Univ.*, 12 Ohio St. 3d 230, 232, 466 N.E. 2d 875 (1984).

The decision to certify a defendant class in this case was an extremely fact sensitive issue. The court heard evidence for three days, examined the evidence in light of the requirements of Rule 23 of the Ohio Rules of Civil Procedure and, finding all of the requirements of Rule 23 satisfied, certified a defendant class. Nothing in the trial court's order can be said to have been an abuse of discretion. Indeed, the very wording of Ohio Civil Rule 23 indicates that the rule anticipates both plaintiff and defendant class actions. The first sentence of the rule states that "one or more members of a class may sue *or be sued* as representative parties . . ." (emphasis added). In fact, defendant classes have been recognized and accepted in both federal and state courts. *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d at 62; see, *Riley v. Kessler*, 2 Ohio Misc. 2d 4, 441 N.E. 2d 638 (Lucas Cty. 1982); *Guy v. Abdulla*, 57 F.R.D. 14 (N.D. Ohio 1972).

The arguments made by the petitioners are simply not supported by the facts on which the trial court based its order. No one is bound by the trial court's injunction until he has been personally served with a copy of the order. The order does not implicate any constitutional rights of the petitioners. If anyone feels that he or she has a unique defense in this case, the Ohio Supreme Court has assured them that those defenses can be raised after the class is certified. *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d at 65.



2. The trial court may enter a permanent injunction which places reasonable time, place and manner restrictions on the petitioners' picketing activity which are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.

Although the constitutions of the United States and the State of Ohio offer some protection to an individual's right of free speech and assembly, that right is not absolute.

The rights of free speech and assembly, while fundamental in our democratic society, do not mean everyone with opinions or beliefs to express may (speak) at any public place at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of anarchy. . . . We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on the streets and highways as these amendments afford to those who communicate ideas by pure speech.

*Cox v. Louisiana*, 379 U.S. 536, 554-55, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965).

The rights of the petitioners were not the only rights adjudicated in this case. The primary issue before the trial court involved the balancing of the rights of the Dayton Women's Health Center, its employees and the general public to unimpeded access to medical care and the constitutional right to privacy associated with a woman's choice to terminate her pregnancy on one side of the scale, with the rights of the picketers and protestors to free speech and assembly on the other side of the scale.

Although peaceful picketing and leafleting are expressive speech and are afforded some protection by the First Amend-

ment, the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner which may be desired. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981). The states may impose reasonable time, place and manner restrictions upon all forms of expression as long as they are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. *United States v. Grace*, 461 U.S. 171, 177, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983); *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

While the petitioners have paid lip service to the notion that an Ohio court may impose some restrictions on their activities, their argument throughout the history of this litigation has been that they are guaranteed the unrestrained freedom to picket and protest whenever, however, and wherever they choose. Their arguments concerning the constitutionality of the permanent injunction fails to acknowledge the elementary and easily grasped distinction between speech and speaker. The injunction places reasonable restrictions on the conduct of the speaker without effecting the content of their speech. The injunction is clearly within the constitutional parameters.

Courts in Ohio and all over the country are using their equitable power to limit picketing activities in clinic harassment cases such as this. *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d 57 (1990); *Fairfield Commons Condominium Ass'n. v. Stasa*, 30 Ohio App. 3d 11, 506 N.E.2d 237 (Lucas Cty. 1985), *cert. denied*, *Moriarty v. Fairfield Commons Condominium Ass'n*, 479 U.S. 1055, 107 S. Ct. 930, 93 L. Ed. 2d 981 (1987); *Bering v. Share*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050, 107 S. Ct. 940, 93 L. Ed. 2d 990 (1987); *Planned Parenthood of Monmouth Cty., Inc. v. Cannizzaro*, 204 N.J. Super. 531,

499 A.2d 535 (1985), *aff'd*, 217 N.J. Super. 623, 526 A.2d 741 (1987). While the petitioners may believe that they should have the unrestricted right to torment and harass individuals and businesses engaged in lawful conduct, state courts have the authority and duty to protect the competing constitutional and common law rights of others. Picketing injunctions necessarily are prospective in nature and set guidelines for conduct based on tortious acts committed in the past.

The scope of the permanent injunction is simply a reflection of the facts introduced into evidence at trial. Notwithstanding their religious and moral convictions, the conduct of the petitioners went beyond the realm of protected free speech and became an abusive vehicle for harassing, intimidating, and coercing the staff, physicians and patients of the Dayton Women's Health Center. It is precisely this type of abusive conduct which the courts are empowered to enjoin through reasonable time, place and manner restrictions. *Bering v. Share*, 721 P.2d 918 (Wash. 1986); *Parkmed Company v. Pro-Life Counseling, Inc.*, 442 N.Y.S. 2d 396, 110 Misc. 2d 369 (Sup. Ct., N.Y. 1981), *modified*, 457 N.Y.S. 2d 27, 91 A.D. 2d 551 (App. Div. 1982); *Planned Parenthood of Monmouth Cty., Inc. v. Cannizzaro*, 204 N.J. Super. 531; *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d 56. All of the restrictions contained in the permanent injunction were designed to control, not eliminate, the petitioners' conduct, in a manner which would also permit the Dayton Women's Health Center and its patients and employees to engage in their constitutionally protected activities. The permanent injunction did not foreclose the petitioners' rights of speech, but merely restricted their activities in a constitutionally permissible manner.

The permanent injunction in this case was designed to protect significant governmental interests. It is well established that the states have a substantial interest in keeping streets and sidewalks open and available for the movement of people and property and in protecting the safety and convenience of



persons using public and private facilities. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. at 649-59; see also, *Cox v. Louisiana*, 379 U.S. 559 (1965); *Cox v. New Hampshire*, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049 (1941). Limiting the number of protestors parading on the sidewalk in front of the clinic is a narrowly tailored means of protecting this interest. Likewise, states have a significant and substantial interest in insuring its citizens' unimpeded access to medical care. *Bering v. Share*, 721 P.2d at 927. Limiting the protest activity to the sidewalk and restricting the petitioners from blocking the ingress and egress of the clinic are narrow restrictions designed to protect that interest. The state also has a significant interest in protecting the right of privacy of women going to the Dayton Women's Health Center and in reducing the coercive impact of picketing on the staff and patients at the Center. Restrictions on the number and location of the picketers and the noise level of their activities are narrowly tailored restrictions which protect this interest.

This Court has regularly rejected the assertion that people who wish to "propagandize protests or views have a constitutional right to do so whenever, however and wherever they please." *United States v. Grace*, 461 U.S. 171, 177-78, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983). A person's right of privacy also protects the means available to effectuate a decision to have an abortion and the physician's right to perform legal abortions without coercive outside restraints. See generally, *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977); *Nyberg v. Virginia*, 495 F.2d 1342 (8th Cir.), cert. denied, 419 U.S. 891, 95 S. Ct. 169, 42 L. Ed. 2d 136 (1974). The testimony in this case conclusively established that the destructive conduct of the picketers caused emotional distress on both the patients and the staff of the Dayton Women's Health Center. The insensitivity of the petitioners' conduct coupled with the insecurity of a woman about to undergo an abortion could have harmful medical consequences. *American College of Obstetricians and Gynecologists v. Thornburgh*, 613 F. Supp. 656, 666 (E.D. Pa. 1985).

The injunction is content neutral and is based on content neutral findings of fact. The trial court properly refused to restrict the content of the petitioners' speech. The injunction was narrowly tailored and only limited the number of picketers, the location of picketing, and the manner of their demonstrations. The petitioners' conduct had given rise to a clear and present danger to patients and physicians and their conduct was incompatible with the character and function of the medical building. *See, Grayned v. Rockford*, 408 U.S. 104, 116, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). The restrictions on the numbers of picketers allowed in proximity of the Dayton Women's Health Center and the extent of the conduct which they were permitted to pursue were limited without regard to the message they were trying to convey. The place restriction was designed to prevent the picketers from blocking the ingress to and egress from the Center and from trespassing. It also sought to control the aggressive, disorderly and coercive nature of the petitioners' activities which caused significant mental and emotional trauma to both the employees and the patients of the Center, as well as the significant business disruption which the petitioners caused.

The injunction is not only content neutral but narrowly tailored to serve the state's significant interests without unduly limiting the petitioners' activities. The injunction does not foreclose alternative channels of communication. It allows the petitioners to convey their beliefs by means of pickets and also allows them to speak with anyone they choose. In addition to being able to express their opinions at the Dayton Women's Health Center and the offices of the physicians, the petitioners are free to voice their opinions and concerns in any other part of the city of Dayton, state of Ohio, or the United States.

The evidence in this case was more than sufficient to enable the court to conclude that injunctive relief was necessary. The petitioners' conduct caused irreparable harm to the clinic and numerous patients who have been subjected

to their constant and relentless harassment. It was the cumulative effect of the petitioners' conduct which necessitated the relief granted by the trial court. The findings of the trial court were supported by competent evidence. The injunction, as modified by the Montgomery County Court of Appeals, fits safely within constitutional parameters and is consistent with the injunctions entered by other Ohio courts, as well as courts nationwide facing similar problems. The provisions of the injunction and its restrictions are clear and easily understood by any individual with the ability to read. Any potential ambiguity or dangling thread of uncertainty concerning the scope or the effect of the injunction was eliminated by the Montgomery County Court of Appeals.

## CONCLUSION

While the nation may be deeply divided over the issue of abortion, this lawsuit does not involve that issue. The case simply revolves around the power of an equity court to balance competing constitutional interests and to protect its substantial interests in keeping streets and sidewalks open and available for the movement of people and property, protecting the safety and convenience of persons using public and private facilities, and insuring its citizens' unimpeded access to medical care. The permanent injunction balances the petitioners' first amendment rights with the competing constitutional rights of others. The injunction preserves the rights of the petitioners to engage in open and robust debate about any subject they choose. The restrictions imposed by the trial court do not restrict the content of their speech. It simply imposes reasonable time, place and manner restrictions during those times when they are at the Dayton Women's Health Center or the private offices of its physicians. States must be free to protect their own interests and the rights of all its citizens. Any other conclusion could lead states down the path of chaos.

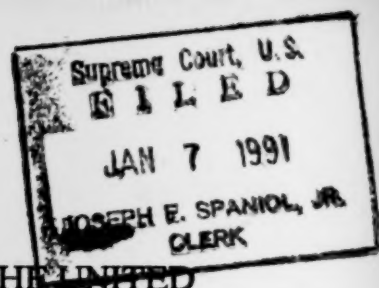
The trial court's injunction and class certification orders were based on the particular facts of this case. Those orders have passed the scrutiny of both the Montgomery County Court of Appeals and the Ohio Supreme Court and should not be the subject of further inquiry by the United States Supreme Court.

The petitioners' writ of certiorari should be denied.

Respectfully submitted,

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No. 90-758



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

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DAVID ENIX, JAMES MEHAFFIE,  
DAVID MEHAFFIE, DOUGLAS SAPP,  
KYM MEHAFFIE and H.F. PERKINS,  
*Petitioners,*

v.

THE DAYTON WOMEN'S HEALTH CENTER, INC.,  
K. W. DAVIS, MD, and ROBERT SKIPTON, MD,  
*Respondents.*

PETITIONERS' REPLY BRIEF

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## QUESTIONS PRESENTED

1. Whether a permanent injunction based upon the content of the speech and not narrowly tailored to serve a compelling state interest may prohibit peaceful assembly and picketing on a public sidewalk.
  
2. Whether a permanent injunction may bind persons who have not engaged in any tortious activities, have not acted in concert with named defendants, have not received notice and have had no opportunity to be heard.



## LIST OF PARTIES

The parties to the proceedings below were the petitioners David Enix, James Mehaffie, David Mehaffie, Douglas Sapp, Kym Mehaffie and H.F. Perkins.

The Respondents before this Court include The Dayton Women's Health Center, Inc., K.W. Davis, MD, and Robert Skipton, MD.



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# REPLY TO BRIEF IN OPPOSITION

## I

**The Respondents' brief relies on facts not found in the record of the lower courts.**

The Respondents' brief is based on allegations never accepted as fact by the lower courts. Despite the Respondents' claims of horrific conduct on the part of the Petitioners, the only tortious conduct noted by the trial court was trespass. The other findings dealt with driveway obstruction and traffic interference. *Dayton Women's Health Center v. Enix*, 86-3120, (C.P. Montgomery Co., Ohio, 1987), pages 5-6.

The trial court's findings are put into perspective by the language of the injunction and by the record itself. For example, according to the trial court, interference with traffic on South Dixie Drive stemmed from sidewalk picketers' signs directed toward motorists. The injunction prohibits display of such signs. *Dayton Women's Health Center v. Enix*, 36-3120, (C.P. Montgomery Co., Ohio, 1987), pages 6-7.

The Respondents rely heavily on allegations of conduct which they alone ascribe to the Petitioners. For example, they state that a bomb threat was phoned in to the clinic. The trial court at no time connected this incident with the Petitioners; the "bomb threat" occurred one and one-half years before Petitioners ever began to picket the Dayton Women's Health Center (DWHC). The majority of the Respondents' so-called "facts" are likewise refuted. The Respondents continue to make facts the issue in this case. They are not. The issues in this case are questions of law. Under the law as expounded by this Court, no set of facts can justify a content-based injunction of innocent non-parties.

Respondents claim that the Petitioners coordinate all the picketing at the DWHC. This is simply not true. The claim assumes that Petitioners control the hundreds of thousands of people in the Dayton area who are opposed to abortion. The Petitioners do not know who "all individuals protesting" abortion are and have no connection with them whatsoever. Such a group is not even a legal entity, yet the injunction purports to bind everyone.

## II

**The cases cited by the Respondents do not support the injunction as a content-neutral time, place and manner restriction**

Respondents cite *Cox v. Louisiana*, 379 U.S. 536, 13 L.Ed. 2d 471, 85 S.Ct. 453 (1965) and *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 69 L.Ed. 2d 298, 101 S.Ct. 2559 (1981), maintaining that the First Amendment does not provide for unlimited expression. There are instances where speech is subject to certain neutral limitations, but this Court has declared on innumerable "occasions" that the First Amendment preeminently protects peaceful dissent in the public square. The Petitioners seek not unlimited freedom but rather the right to peacefully speak out in the public square without the threat of arrest and legal sanction.

The Respondents maintain, and Petitioners agree, that First Amendment speech and assembly are subject to neutral time, place and manner restrictions. They extend that rule of law to include this injunction, claiming that it "places reasonable restrictions on the speaker without effecting [*sic*] the content of their speech." But the

injunction *does* affect the content of their speech. It restricts only those speakers who engage in a particular category of speech--speech protesting abortion. No speech critical of abortion may take place on the public easement across the street from the clinic, on the public sidewalk north or south of the DWHC, or on any private property within view of the DWHC. Even if the injunction involved otherwise reasonable time, place or manner restrictions, when they are applied *exclusively* to those "protesting the activities conducted at the Dayton Women's Health Center" they become content-based prohibitions. Content-based restrictions, reasonable or otherwise, call for a much stricter level of judicial scrutiny and must be justified by a compelling state interest. *Boos v. Barry*, 485 U.S. 312, 99 L.Ed. 2d 333, 108 S.Ct. 1152 (1988). The Respondents consistently refuse to address this issue.

Only one case cited by the Respondents, *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d 57, 556 N.E. 2d 157 (1990), dealt with a defendant class action. *Planned Parenthood* did not address the propriety of an injunction against the class. The other cases cited by



Respondents dealt only with named defendants, not a class. None of the cases upheld restrictions against individuals based on their expressing a viewpoint against abortion such as the injunction challenged here. This is not a reasonable time, place or manner restriction. This is viewpoint discrimination. *See, Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 87 L.Ed. 2d 567, 105 S.Ct. 3439 (1985) (government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.)

Respondents urge that courts may freely restrict the peaceful expression of all members of a broad defendant class because some class members have engaged in tortious conduct. Courts may enjoin tortious acts by those who have engaged in them. They may not enjoin those who have not. And they may not extend the injunction to include innocent persons and non-parties with little or no connection to those engaged in past unlawful acts. This is the clear ruling of this Court in *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 89 L.Ed. 2d 661, 85 S.Ct. 478 (1945), *NAACP v. Claiborne Hardware*, 458

U.S. 886, 73 L.Ed. 2d 1215, 102 S.Ct. 3409 (1982), *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 78 L.Ed. 894, 54 S.Ct. 475 (1934) and others as cited in Petitioner's application for the Writ. Respondents cannot justify the challenged injunction in light of these clear holdings. They cite no case, as there are none, which suggests that courts have the power to bind non-parties who act independently of named defendants.

### III

**The cases cited by the Respondents do not support the assertion that there is a government interest at stake which justifies the challenged injunction.**

The Respondents maintain that "significant government interests" outweigh the Petitioners' rights to peaceful assembly and protest. The first asserted interest is that of "keeping streets and sidewalks open . . . and in protecting the safety and convenience of persons using public and private facilities."<sup>1</sup> Under the guise of keeping

1 It is odd that Respondents would assert this government interest. Responding to questions at the trial, Anita Wilson, the Director of the DWHC, testified:

Q. You don't have any complaint, I gather, with them as long as they stay on the sidewalk?

the sidewalks conveniently open the Respondents would close them to free speech. They attempt to support this notion with *Heffron* and *Cox v. Louisiana*, both *supra*, as well as *Cox v. New Hampshire*, 312 U.S. 569, 85 L.Ed. 1049, 61 S.Ct. 762 (1949). But the government interest asserted in *Cox v. Louisiana* was the protection of the integrity of the judicial process in the face of public protest. Both *Heffron* and *Cox v. New Hampshire* dealt with content-neutral restrictions on speech. Unlike the injunction here, a neutral restriction protecting traffic flow would limit all picketers in front of the DWHC to ten, not just those protesting abortion. If the injunction were content-neutral then no picketers would be allowed across the street from the clinic; but in that location the injunction forbids only pro-life picketing. The Respondents also cite *U.S. v. Grace*, 461 U.S. 171, 75

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A. As long as it is peaceful quiet picketing on the sidewalk.

Q. Okay. So, those are the things that you, in your mind have asked this court to determine, but I'm asking you as far at the sidewalk usage, you are not complaining that there is too much crowding or that people can't walk. I'm not hearing any of that from you, right?

A. Correct.

Trial Transcript at 90.

L.Ed. 2d 736, 103 S.Ct. 1702 (1983), proposing that First Amendment rights may not be exercised by persons "whenever, however and wherever they please." In *Grace*, however, a restriction of free speech on the public sidewalk, much like the injunction here, was struck down, not upheld. If *Grace* stands for anything, it stands for the proposition that courts may not arbitrarily forbid free speech on public sidewalks.

Respondents also assert that the privacy rights of the patients and staff of the DWHC are paramount to the Petitioners' rights to free speech. They cite *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed. 2d 64 (1977), *Nyberg v. Virginia*, 495 F. 2d 1342 (8th Circ.), *cert. denied*, 419 U.S. 891, 95 S.Ct. 169, 42 L.Ed. 2d 136 (1974), and *American College of Obstetricians and Gynecologists v. Thornburgh*, 613 F.Supp. 656, 666 (E.D. Pa, 1985) to support this position. In each of these cases, however, the privacy right was asserted against the *state*, never against a private citizen. The right to privacy announced in the *Roe v. Wade*, 410 U.S. 113, 35 L.Ed. 2d 147, 93 S.Ct. 705, *reh. den.* 410 U.S. 959 (1973) line of cases is claimed by the individual against the *government*. It is not claimed by the

individual against other private citizens. This Court has never formulated a privacy right protecting the individual in the public forum from being exposed to views with which they disagree. See e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1942) and *Cohen v. California*, 403 U.S. 15, 29 L.Ed. 2d 284, 91 S.Ct. 1780 (1971). If the First Amendment protects the right of an individual to say "F--k the draft" inside a county courthouse it certainly protects an individual's right to say "Save your Baby" on a public sidewalk.

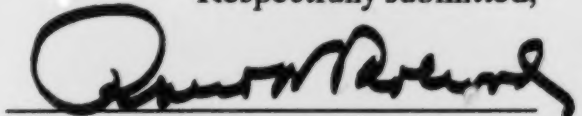
No right of privacy is protected by an injunction which allows ten persons to protest on the public sidewalk but not eleven. The Respondents cannot seriously contend that privacy rights are protected by allowing picketers in front of the clinic, but forbidding them across the street from the same building, or by allowing them on the sidewalk in front of DWHC, but not on the sidewalk farther away. This Court has not at any time ruled that a privacy right can justify content-based prohibitions of free speech in the public forum. Such a theory turns the constitution upside down, restricting the very thing the

First Amendment was designed to protect: public discourse on a matter of public interest.

### CONCLUSION

The Brief in Opposition relies on facts not found in the record in this case. It does not address this Court's precedents regarding content-based restrictions of free speech in the public forum. The Respondents do not properly construe the right of privacy as delineated by this Court. Finally, no explanation is offered why an injunction can issue against innocent non-parties, acting independently of named defendants, who only wish to engage in constitutionally protected activity. For the foregoing reasons the petition should be granted.

Respectfully submitted,



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